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No. 80-1579

In the Supreme Court of the United States

October Term, 1980

KURZ-KASCH, INC.,
Petitioner,

vs.

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 11,
Respondent.

- and -

KURZ-KASCH, INC.,
Petitioner,

vs.

PAUL W. WEIMER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 16, 1981

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QUESTIONS PRESENTED

1. Does a district court commit reversible error when it stays a union's action over insurance premiums and orders that issue to arbitration under the grievance procedure of the union's collective bargaining agreement?

2. Does a district court commit reversible error when it dismisses a union's action over insurance premiums after a labor arbitrator has heard and decided its underlying claim?

3. Does a district court commit reversible error when it stays an individual's claim for insurance premiums pending arbitration under a union contract of an identical dispute, and then dismisses that action after the arbitrator has disposed of the underlying claim?

4. Did the Court of Appeals incorrectly hold, under the controlling federal law of collective bargaining agreements, that a district court could order arbitration only if the union requested it?

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Kurz-Kasch, Inc.,[1] prays that a Writ of Certiorari issue to review and reverse the consolidated order entered in these cases on December 17, 1980 by the United States Court of Appeals for the Sixth Circuit.

1. In accordance with Supreme Court Rule 28.1, the Petitioner states that it has no parent, subsidiary (other than wholly owned), or affiliated companies.

ORDER BELOW

The Court of Appeals entered its order on December 17, 1980. (App. 1) The Court of Appeals in that single order vacated the judgments entered by the District Court for the Southern District of Ohio in Metal Polishers, et al. v. Kurz-Kasch, Inc., Civil Action No. C-3-76-184 (S.D. Ohio 1979) (unreported), vacated and remanded, No. 79-3379 (6th Cir. December 17, 1980) (unreported) (App. 5), and Weimer v. Kurz-Kasch, Inc., Civil Action No. C-3-78-173 (S.D. Ohio 1979) (unreported), vacated and remanded, No. 79-3405 (6th Cir. December 17, 1980) (unreported). (App. 6)

JURISDICTION

The judgment in the Court of Appeals for the Sixth Circuit was entered on December 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Code, Title 29:

§171(c)

It is the policy of the United States that—

* * *

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provisions for adequate notice of any pro-

posed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

§173(d)

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputed only as a last resort and in exceptional cases.

§185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

United States Code, Title 9:

§3

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one

of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§10

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Ohio Revised Code, Title 27:

§2711.02

If any suit or proceeding is brought upon any issue referable to arbitration under an agreement in

writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceedings is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§2711.10

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

(A) The award was procured by corruption, fraud, or undue means.

(B) There was evident partiality or corruption on the part of the arbitrators, or any of them.

(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators.

STATEMENT OF THE CASE

1. The Union's Action (Sixth Circuit Case 79-3379)

Following the expiration on September 14, 1975, of collective bargaining agreements between the Petitioner, Kurz-Kasch, Inc. (hereinafter the "Company") and various labor organizations, including Metal Polishers, Buffers, Platers and Allied Workers, Local No. 11 (hereinafter the "Union" or "Local 11"), the Company closed the plant where those agreements were in effect. Thereafter, the Company notified the membership of Local 11 and the other labor organizations that it would no longer continue to pay group insurance premiums to their members. (App. 12, 35)

The Union's complaint against the Company in the U.S. District Court was filed June 9, 1976 solely under §301 of the Labor Management Relations Act, 29 U.S.C. §185. It alleges that Kurz-Kasch unlawfully refused to continue group insurance premiums for retirees. Discontinuation of premium payments for others affected by the closure are not involved in this proceeding.

In the District Court, the parties stipulated that there was a collective bargaining agreement in effect from September 15, 1973 through September 14, 1975; that certain persons retired from Kurz-Kasch; that, when the collective bargaining agreement expired in September, 1975, the parties attempted to negotiate a new agreement but were unsuccessful in so doing; and that the Union was notified that the life insurance and Blue Cross/Blue Shield coverage for retirees would be discontinued in early 1976. (App. 11-13)

In March, 1977, the Company and the Union filed cross motions for summary judgment. On April 5, 1977,

the District Court stayed the action, pending arbitration of the dispute. The Court noted the existence of a grievance and arbitration provision in the expired contract which, by its terms, permitted ". . . any Employee or group of Employees . . . [who] believe that he or they have been unjustly dealt with or that any provision of this Agreement has been or is being violated . . ." (App. 26) to file a grievance, and which permitted the Union committeemen or a "Union Representative" to present a grievance which "involves a group of Employees or the Union." (App. 28) The agreement culminates in final and binding arbitration by an arbitrator selected by mutual agreement. (App. 27-28) The District Court noted that "both parties agree that this issue is arbitrable. . ." (App. 14); "[a]ccordingly, the parties are hereby ordered to proceed with arbitration of this dispute." (App. 15) The Court's judgment entry noted that "[t]his matter is hereby stayed pending the arbitrator's decision." (App. 16)

On September 5, 1978, the Union moved the Court to amend its order, to preclude the Company from challenging the arbitrability of the dispute before the arbitrator. The Court denied this motion after a meeting with counsel for both parties on September 5, by notation order dated September 6 and by judgment entry dated September 11, 1979. (App. 18-20) The dispute between the Union and Kurz-Kasch concerning group insurance premiums for retirees proceeded to arbitration in accordance with the order of the District Court.

The Union and Kurz-Kasch agreed to the appointment by the Federal Mediation and Conciliation Service of Charles Chapman to hear and decide the dispute.[2] Chapman heard the matter on September 6, 1978. Both parties

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2. Federal Mediation and Conciliation Service file number 78K13752. (App. 22)

were represented by counsel, a transcript of the hearing was made by a court reporter, and post-hearing briefs were received by Chapman on November 3, 1978. (App. 22-23)

Although the contract required a separate hearing where one party challenges arbitrability (App. 39), the parties represented to the District Court and to the Arbitrator that he could decide procedural arbitrability as well as the substance of the dispute at a single hearing. (App. 21-22) The arbitrator proceeded to do so. He ruled that the matter was arbitrable. (App. 39-40) As to the merits, he ruled that:

> When the contract ended on September 14, 1975, without renewal, the plans could be terminated at any time by nonpayment of the premiums by the Company. The Company had a legitimate right to do this.
>
> The Union's basic argument is that somehow the right of retirees to continue to have the Company pay these premiums is a *vested* right based on an assumption that the promise to pay these premiums during their retirement constituted an inducement for them to continue in their employment with the Company until the retirement date.
>
> There is no language in the contract which gives the retirees a vested right to these insurance benefits. Further, there is no language in the contract from which it could reasonably be inferred there was a vesting.
>
> * * *
>
> As an Arbitrator, I am only concerned, in this case, with the interpretation of the contract the parties agreed to and the evidence submitted at the hear-

> ing which woudl [sic] have a bearing on its interpretation. (App. 42-43; emphasis in the original.)

Accordingly, the arbitrator ruled (1) that the grievance was arbitrable and (2) that the grievance had no merit. (App. 46)

After the award issued, counsel for the Union informed the arbitrator that his award contained a clerical omission which was corrected by the arbitrator on January 25, 1979. (App. 46-48)

On February 21, 1979, the District Court issued an order noting that this dispute had been referred to arbitration, and "[i]t now appearing that an arbitrator's decision has been rendered, the above-entitled matter is hereby DISMISSED." (App. 49) The Union, which took no action to contest the award (or, indeed, the initial referral to arbitration) in the District Court, appealed from this dismissal.[3]

2. The Weimer Action (Sixth Circuit Case 79-3405)

On November 15, 1977, prior to filing his complaint in the District Court, Weimer attempted to intervene in the Local 11 case.

Weimer's motion for intervention was denied by the District Court on January 12, 1978, and Weimer's motion for reconsideration of that order, filed April 11 1978, was denied by the Court on April 19, 1978. (App. 17)

The Court's order denying reconsideration declared that Weimer, if he wished to proceed with his action,

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3. The Union filed no motion to vacate the arbitrator's award, under either the U.S. Arbitration Act, 9 U.S.C. §10, or the Ohio Arbitration Act, 27 O.R.C. §2711.10. *See, e.g., Teamsters, Local 135 v. Jefferson Trucking Co., Inc.*, 628 F.2d 1023 (7th Cir. 1980), *cert. den.*, ... U.S. ....., 106 L.R.R.M. 2256 (Jan. 26, 1981).

would have to file a separate action. (App. 17) Weimer did so on June 30, 1978. (App. 50) It alleges that the Company unlawfully refused to continue group insurance premiums for retired members of labor organizations other than Local 11. As in the Local 11 case, the Court's jurisdiction was invoked solely under §301 of the Labor Management Relations Act, 29 U.S.C. §185. Because the action of Local 11 had been referred to arbitration by the Court, Weimer and the Company jointly moved the Court to allow the Company to postpone answering the complaint or otherwise pleading until after receipt of the award in the Local 11 case. (App. 57) The parties represented to the Court that Weimer's case raised the identical legal issue raised in the Metal Polishers' case, and that the "same contract clause is the subject of both cases." (App. 58)

The award was issued December 28, 1978. (App. 46) Thereafter, the District Court notified the parties on January 24, 1979, that it proposed to dismiss Weimer's action, because the Court believed "the award of the arbitrator is dispositive." (App. 64) The Court invited counsel to advise the Court if they felt dismissal would be inappropriate: "In the event any of counsel feel that [this case] require[s] further consideration by the Court, I would appreciate such advice." (App. 65)

When the Court did not receive its solicited advice, it dismissed Weimer's action on March 15, 1979, stating:

> It appearing to the Court that all matters in controversy in the above matter have been disposed of by determination of the arbitrator in the matter of Metal Polisher, [sic] etc., v. *Kurz-Kasch,* Case No. C-3-76-184, the above entitled matter is hereby DISMISSED with prejudice. (App. 65)

Weimer appealed from the dismissal.

3. The Appeals of Both Actions

In its order, dated December 17, 1980, the Court of Appeals for the Sixth Circuit took note of the "lack of diligence" displayed by the Union and by Weimer in the District Court. The Court of Appeals also found "some justification for Kurz-Kasch's assertion that [Local 11 and Weimer] acquiesced in the procedures employed" by the District Court. (App. 2-3) Nevertheless, the Court vacated the judgment below, and remanded the disputed claims to the District Court, based on its interpretation of the "express language of the collective bargaining agreement." (App. 3) The Court of Appeals held that the express contractual language precluded arbitration "unless the union requested arbitration and, therefore, the court erred in so referring the matter" to arbitration. (App. 3)

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Sixth Circuit Failed to Apply Prior Supreme Court Decisions.

The Court of Appeals cites no precedent for its refusal to uphold the action of the District Court in ordering arbitration under the contract. It could not, for precedents are all to the contrary.

The *Steelworkers* trilogy[4] is this Court's strong imprimatur of arbitration in labor disputes. In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), this Court held that "[a]part from matters that the parties specifically exclude, all of the questions on which the

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4. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement."[5] 363 U.S. at 581. "[O]nly the most forceful evidence . . . exclude[s] the claim from arbitration." 363 U.S. at 585. Indeed, the Sixth Circuit has enforced this federal policy in *NCR Employees Independent Union v. National Cash Register Co.*, 489 F.2d 716 (6th Cir. 1973), *cert. den.*, 416 U.S. 970 (1974), relied upon by the District Court in its decision below, referring Local 11's dispute to arbitration. (App. 15) Now, the Sixth Circuit has ignored the presumptions in favor of arbitrability; it has also turned a deaf ear to the command that all doubts are resolved in favor of arbitrability.

These cases are controlled by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In *Maddox*, this Court stated that an individual "wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." 379 U.S. at 652 (emphasis by the Court). The rationale for this requirement was concisely presented:

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5. The principle quoted above has been a constant theme echoed in countless cases since decision of the *Steelworkers* trilogy. It is, in fact, a theme reflected in the statute itself. 29 U.S.C. §173(d) states:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

This Court's decision in *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers*, 430 U.S. 243, *reh. den.*, 430 U.S. 988 (1977), establishes that the federal policy favoring arbitration of labor disputes survives contract expiration. *Nolde Brothers* and its progeny therefore rebut any purported distinction between these cases and the myriad other cases in which the complaining party has been required to invoke the arbitral, rather than the judicial forum. *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77 (3rd Cir. 1978); *United Steelworkers of America v. Fort Pitt Steel Casting Division*, 635 F.2d 1071 (3rd Cir. 1980); *Chambers v. Beaunit Corporation*, 404 F.2d 128 (6th Cir. 1968); *Shaffer v. Mitchell Transport, Inc.*, 635 F.2d 261 (3rd Cir. 1980).

> [I]t cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so. 379 U.S. at 653.

That the plaintiff in *Maddox* sued for severance pay allegedly due following a final and permanent plant shutdown did not alter these principles. This Court specifically found that

> Grievances depending on severance claims are not critically unlike other types of grievances. 379 U.S. at 656.

The Court continued:

> [E]ven in that narrow situation [final and permanent plant shutdown], if applicable law did not require resort to contract procedures, the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement. If applicable law permitted a court suit for severance pay in any circumstances without prior recourse to available contract remedies, an employer seeking to limit the modes of redress that could be used against him could do so only by eliminating contract grievance procedures for severance-pay claims. *Id.*

Local 11's and Weimer's claim are for group insurance benefits, rather than severance pay. As in *Maddox,* however, the "suit[s] in the present case[s are] simply on the contract, and the remed[ies] sought, . . . [do] not differ from any that the grievance procedure[s have] power to provide." 379 U.S. at 657.

The Sixth Circuit also ignored its own decision in *Chambers v. Beaunit Corporation*, 404 F.2d 128, 131 (6th Cir. 1968), where it stated:

> Had plaintiff instituted this action prior to seeking arbitration, the District Court would have been compelled to dismiss the action because the plaintiff had not followed the grievance procedures, including arbitration, provided for in the collective bargaining agreement.

By its order below, the Sixth Circuit completely ignored the strictures expressed by this and other courts relating to the preference for the arbitral forum. Without citing a single authority for its decision, the Court of Appeals not only abrogated the Company's contractual rights, but also ignored over 20 years of judicial encouragement of labor arbitration over labor litigation.

The Sixth Circuit's decision directly collides with *Boys Markets, Inc. v. Retail Clerks' Union, Local 770*, 398 U.S. 235 (1970). Applications for *Boys Markets* injunctions, to terminate strikes in breach of contract, *must* be premised on the employer's promise "to arbitrate, as a condition of his obtaining [the injunction]." 398 U.S. at 254. This Court does not require that a district court, when requested to enter an order to stop a strike in breach of contract, first decide the merits of the contractual dispute that precipitated the strike. The employer must *arbitrate* if he is to receive the requested order. Similarly, Local 11 and Weimer are bound by the negotiated all-inclusive arbitration clause; they cannot ignore that clause after conceding to the District Court the issue is arbitrable.[6]

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6. The Union cited this Court's *Nolde Bros.* decision to the District Court in connection with its motion for summary judgment. It further admitted that its dispute was arbitrable, in its motion to amend judgment, filed September 5, 1978. (App. 18-19)

(Continued on following page)

The standards which govern the judicial interpretation of the arbitration clause in a collective agreement are simple and telling. In *Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers,* 430 U.S. 243, *reh. den.,* 430 U.S. 988 (1977), this Court held that "where the dispute is over a provision of the expired agreement [in order to exclude the dispute from arbitration] the presumptions favoring arbitrability must be negated expressly or by clear implication." 430 U.S. at 255. The collective agreements involved in these cases do not expressly preclude arbitration of a dispute over insurance premiums for retirees. The Court of Appeals relied entirely upon the contractual provision that arbitration may be had "at the request of the Union." (App. 27, 60, 62) That language does not expressly preclude arbitration at the request of another party or by order of a federal court, and particularly not when the union is the party seeking to invoke the jurisdiction of the court.

Nor, when read in context, does the contract clause relied upon by the Court below provide the "clear implication" required to negate the forceful presumptions in favor of arbitrability. Under each contract, the grievance procedure is to resolve *all* disagreements; matters in dispute *"shall* be taken up" as provided. (App. 26, 60, 62; emphasis added) *Nothing* in the language of the agreements implies, clearly or otherwise, that a court may not order arbitration.

Footnote continued—

Weimer admitted, in his complaint in the District Court, that the dispute was arbitrable. (App. 55) It is apparent, in any event, that the subject of alleged entitlement to group insurance premiums for retirees is grievable and arbitrable, following expiration of the collective agreement and plant closing. *United Steelworkers of America v. Canron, Inc.,* 580 F.2d 77 (3rd Cir. 1978); *United Steelworkers of America v. Fort Pitt Steel Casting Division,* 635 F.2d 1071 (3rd Cir. 1980).

Far from honoring the standards required by *Nolde Brothers,* by *Warrior & Gulf,* and by the *Steelworkers* trilogy generally, the Court below has turned those standards on their head. The Court did not find, as it could not, that the contractual language expressly precluded arbitration of these disputes;[7] instead, it improperly held that because the parties' contracts did not expressly *include* language permitting arbitration at the instigation of the court, rather than the union, the disputes were not within the grievance and arbitration provisions of the contract: "[U]nder the express language of the . . . agreement, the provisions which are the subject of the dispute in these appeals were not arbitrable, unless the union requested arbitration." (App. 3)

In so concluding, the Court of Appeals has distorted the very contractual language it was called upon to interpret. The petition should be granted because of the failure of the Court of Appeals to follow the controlling decisions of this Court.

2. The Decision of the Sixth Circuit Is in Irreconcilable Conflict With Other Circuits With Respect to the Federal Law of Arbitrability.

The Order below has created a sharp conflict within the Circuits over the effect to be given to arbitration clauses of collective bargaining agreements when one party consents to arbitration, and then contests an unfavorable result. Only this Court can resolve the conflict.

The Court of Appeals in all Circuits have, up to now, *required* district courts to order arbitration when there is any conceivable doubt.

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7. Any such implication in the order below is entirely erroneous. The parties' expired agreements expressly state circumstances in which the union may request arbitration. They are silent as to whether arbitration may be required upon motion of the Court.

Thus, in *IBEW, Local 278 v. Jetero Corp.*, ... F. Supp. ....., 88 L.R.R.M. 2182 (S.D. Tex. 1972), *aff'd*, 496 F.2d 661 (5th Cir. 1974), the union requested a preliminary injunction against the employer. The district court, as here, denied the relief requested on the merits but issued an order compelling the employer to comply with the arbitration provision of the collective bargaining agreement. On appeal from the district court's later, and partial, vacation of the arbitrator's award, the Fifth Circuit held that the district court did not err in requiring arbitration.

In *Sam Reisfield & Son Import Co. v. S. A. Eteco*, 530 F.2d 679 (5th Cir. 1976), the Fifth Circuit again recognized the authority of a federal district court to require arbitration without a request by either party for arbitration. The defendant had moved the district court to dismiss for lack of jurisdiction; the district court treated the motion "as one seeking a stay pending arbitration." 530 F.2d at 680. *Reisfield* was a simple commercial dispute; the authority of the federal courts to require arbitration cannot be less in a labor-management dispute, given this Court's recognition of the unique policy considerations involved in such disputes, in the *Steelworkers* trilogy and subsequent cases.

In *International Detective Service, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 251*, 614 F.2d 29 (1st Cir. 1980), the First Circuit affirmed a district court decision granting a *Boys Markets* injunction but conditioning the grant of the injunction by *requiring* the Company to arbitrate, not only the grievance which had precipitated the strike, but also two separate grievances which neither the Company nor the union had requested the court to consider. 614 F.2d at 30. The Court stated,

> "[t]he district court had inherent power in 'balancing the equities' to require that all of the arbitrable grievances between the parties be submitted to arbitration. . . ." 614 F.2d at 32.

Not only did the First Circuit affirmatively recognize the inherent authority of a district court to order arbitration even in the absence of a formal request for arbitration; the court also refused to permit the plaintiff, in that case the employer, to do what Local 11 and Weimer, the plaintiffs herein, are attempting. After seeking a *Boys Markets* injunction, International Detective Service notified the union that it regarded the wildcat strike as nullifying the contract. When the employer pressed this argument on appeal, the Court of Appeals responded:

> "The company cannot rely on the contract initially to obtain the *Boys Markets* injunction and then renounce it in challenging the breadth of the *quid pro quo* for continuation of that injunction. The company's December 13, 1978, renunciation of the contract was without effect in the context of the *Boys Markets* injunction that the company received." 614 F.2d at 32.

Here, the only basis for federal jurisdiction initially is Section 301 of the Labor-Management Relations Act;[8] the Union and Weimer sued to obtain benefits allegedly arising under the expired collective bargaining agreements with Kurz-Kasch. As in *International Detective Service, Inc.*, Local 11 and Weimer may not rely on the group insurance provisions of the expired agreements, and at the same time renounce the grievance-arbitration provisions thereof.

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8. 29 U.S.C. §185.

In *Shaffer v. Mitchell Transport, Inc.*, 635 F.2d 261 (3rd Cir. 1980), the union had filed a grievance, after which a number of individual plaintiffs sued the employer. The plaintiffs in their suit "requested that the court enjoin the grievance procedure previously initiated by the Union." 635 F.2d at 264, n. 2. The district court decided that the issue in dispute was not arbitrable, and further decided the merits of the case against the employer. The Third Circuit vacated the judgment. Relying primarily upon the underlying federal policy expressed in the *Steelworkers* trilogy, the Court stated:

> "We hold that the dispute is arbitrable under the terms of the collective bargaining agreement. The district court was therefore without jurisdiction to address the merits of the complaint and should have stayed its proceedings." 635 F.2d at 264.

On remand, the District Court was directed "to stay the proceedings pending arbitration," 635 F.2d at 267, even though no party had requested arbitration of the dispute. 635 F.2d at 264, n. 2, 267, n. 12.

By its unwarranted reliance on a mere six words of the contractual grievance procedure, rather than the entire grievance-arbitration clause in each contract, the Sixth Circuit has engaged in the "casuistic reading of the contract" condemned by this Court in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 659 (1965). *See, also, Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers*, 430 U.S. 243, *reh. den.*, 430 U.S. 988 (1977); *United Steelworkers of America v. Fort Pitt Steel Casting Division*, 635 F.2d 1071, 1075 (3rd Cir. 1980); *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77, 82 (3rd Cir. 1978).

CONCLUSION

The petition for a writ of certiorari should be granted. The Order of the Court of Appeals for the Sixth Circuit should be vacated, with instructions to reinstate the judgment of the District Court entered in Nos. C-3-76-184 and C-3-78-173.

Respectfully submitted,

FRANK H. STEWART
(Counsel of Record)
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(513) 381-2838
Counsel for Petitioner,
Kurz-Kasch, Inc.

Of Counsel:

JEFFREY B. KELLY
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March 16, 1981

APPENDIX

APPENDIX

Nos. 79-3379 and 79-3405

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS, International Union, AFL-CIO, Local 11,
Plaintiff-Appellant

vs.

KURZ-KASCH, INC.,
Defendant-Appellee (79-3379)

PAUL A. WEIMER,
Plaintiff-Appellant

vs.

KURZ-KASCH, INC.,
Defendant-Appellee (79-3405)

ORDER

(Filed December 17, 1980)

Before: ENGEL, MERRITT and JONES, Circuit Judges

While neither consolidated in the district court or on this appeal, the above described cases were both heard before a panel of the court on the same day. The ultimate substantive issue involves almost identical provisions of separate collective bargaining agreements in which it is claimed that the defendant-appellee Kurz-Kasch, Inc. is obligated to continue payment of group insurance premiums to a certain class of retired employees of Kurz-

Kasch, even though the collective bargaining agreements containing the promise have expired and the company has discontinued its operations at the plant where the employees had labored. Each appeal presents intricate and independent issues concerning the manner in which the judgments in the district court were reached.

It is strongly urged by appellants in each case that the trial judge acted with undue haste and without authority and adequate notice for the parties adequately to develop their proofs and for the case to be heard in an ordinary fashion. Thus, it is charged in No. 79-3379, Local 11 v. Kurz-Kasch, Inc., that the district judge unilaterally and without prior notice ordered arbitration when it had not been sought by the plaintiffs who instead were seeking relief on behalf of the employees of that union under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Further, it is claimed that upon receipt of the arbitrator's award, the district court without adequate notice entered judgment thereon. In No. 79-3405, Weimer v. Kurz-Kasch, Inc., the appellant employees[1] assert that the district court, although it denied their petition to intervene in the suit commenced by Local 11, nonetheless, without adequate notice and before Kurz-Kasch filed any responsive pleadings, dismissed their cause *sua sponte* upon receipt of the arbitrator's award in the action by Local 11. Thus, the employees were bound by the arbitration even though they had not been a party to that action or been allowed to intervene.

In fairness to the district judge, there is in each case some justification for Kurz-Kasch's assertion that the plaintiffs acquiesced in the procedures employed and that any unseemly haste to terminate the litigation on the part of

---

1. Weimer represents the interests of employees who did not belong to the union in No. 79-3379.

the trial judge was matched by an equal lack of diligence on the part of the appellants. Contrary to the express findings of the district judge, it appears that the appellants in the Local 11 suit, No. 79-3379, never agreed to submit the cause to arbitration; however, they did not articulate their objections thereto and further, upon the filing of the decision by the arbitrator, they failed to make any objections to the award,[2] but instead perfected their appeal to this court.

Likewise, in Weimer v. Kurz-Kasch, Inc., No. 79-3405, the appellant specifically alleged in the complaint that the claims were grievable under the contract. The appellant also concurred that the other suit contained similar legal issues which could affect, if not control, the result in its own suit.[3]

While it is possible to review extensively each of the highly technical claims of error, the court, after a review of the file, is convinced that in all events, under the express language of the collective bargaining agreement, the provisions which are the subject of the dispute in these appeals were not arbitrable, unless the union requested arbitration and, therefore, the court erred in so referring the matter.

Therefore, in order to avoid a miscarriage of justice which could otherwise result from a misconstruction of the confused record in this appeal, the court concludes that the judgment of the district court in each instance be

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2. Although both the Ohio and United States Arbitration Acts require such a motion to be served within three months, the district court dismissed before such time had expired.

3. The court notes that this is not necessarily a gesture of acquiescence on the part of Weimer. If the arbitration had come out in favor of Local 11, principles of collateral estoppel may have prevented Kurz-Kasch from contesting this case. We need not reach this issue since the arbitrator decided in favor of Kurz-Kasch.

vacated and the causes remanded for further proceedings in the district court consistent with the determination of this court that the interpretation of the collective bargaining agreement with respect to the rights of the plaintiffs was not subject to the grievance and arbitration procedure of the contract.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS & ALLIED WORKERS INTERNATIONAL UNION, LOCAL 11,
Plaintiff,

vs.

KURZ-KASCH, INC.,
Defendant.

JUDGMENT

(Filed February 21, 1979)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the above entitled matter is hereby DISMISSED. Each party to bear its own costs.

Dated at Dayton, Ohio, this 21st day of February, 1979.

/s/ John D. Lyter
Clerk of Court
By /s/ Rebecca E. Anderson
Rebecca E. Anderson,
Deputy

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-78-173

PAUL W. WEIMER,
Plaintiff,

vs.

KURZ-KASCH, INC.,
Defendant.

JUDGMENT

(Filed March 15, 1979)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that upon the determination of Case C-3-76-184; the above entitled matter is hereby DISMISSED with prejudice.

Dated at Dayton, Ohio, this 15th day of March, 1979.

/s/ John D. Lyter
Clerk of Court
By /s/ Rebecca E. Anderson
Rebecca E. Anderson,
Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION AFL-CIO, Local 11, 5578 Montgomery Road, Cincinnati, Ohio 45212
Plaintiff

vs.

KURZ-KASCH, INC., 1421 South Broadway, Dayton, Ohio
Defendant

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTION AND DAMAGES

(Filed June 9, 1976)

Now comes the Plaintiff, and for its Complaint against Defendant states:

1. This Court has jurisdiction of this action under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185.

2. Plaintiff, Metal Polishers, Buffers, Platers and Allied Workers, International Union AFL-CIO, Local 11 is an unincorporated association, a labor organization within the meaning of Section 2 (5) of the National Labor Relations Act (29 U.S.C. Section 152(5)) and Section 301 of the Labor Management Relations Act (29 U.S.C., Sec. 185).

3. Defendant, Kurz-Kasch, Inc., is a corporation, duly organized under law and is engaged in business at Dayton, Ohio, and other locations within the State of Ohio, and is an employer within the meaning of Section 2(2) of the National Labor Relations Act (29 U.S.C., Sec. 152(2)) and Section 301 of the Labor Management Relations Act.

4. Plaintiff brings this action on behalf of all its members and former members and former employees of the Defendant corporation who are entitled to the benefits of the contract between Plaintiff and Defendant as hereinafter set forth.

5. Plaintiff has been at all times mentioned herein recognized by the Defendant as the exclusive bargaining representative for the employees of the departments represented by the Union in the 1421 South Broadway, Dayton, Ohio, plant of the Defendant, except as to all janitors, office and clerical employees, professional employees, guards and supervisors as defined in the National Labor Relations Act, as amended, with respect to rates of pay, hours and other conditions of employment of such employees.

6. Defendant entered into a collective bargaining agreement with Plaintiff on September 15, 1973, ARTICLE XIV, Paragraph 3 of said Agreement provided that:

> "It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to such age by reason of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who has ten (10) years continuous employment by the Company, may, upon retirement continue their participation in existing group insurance plans applicable to such Employee by paying fifty percent (50%) of the premium required for such in-

surance. The Company agrees to pay all such group insurance premiums required for the continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-two (62) years of age or over, or who retires prior to such age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who has fifteen (15) years or more continuous employment by the Company and who retires from active employment. It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees are, in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases."

7. From said date of September 15, 1973, until January 1, 1976, the Defendant maintained group insurance policies under which employees described above in ARTICLE XIV, Paragraph 3 were beneficiaries, but on January 1, 1976, Defendant unlawfully terminated said group insurance policies and has ever since said date refused to reinstate same.

8. As a result of the breach of said contract and the unlawful termination of said group insurance policies persons coming within the terms of said contract mentioned above who are former employees of the Defendant and are members of the Plaintiff Union are without the benefit of said group insurance which Defendant is obligated to furnish by the terms of the Collective Bargaining Agreement mentioned above.

9. Plaintiff is without any adequate remedy at law.

WHEREFORE, Plaintiff demands:

(1) That the Court enter a declaratory judgment finding that Defendant has unlawfully terminated the above group insurance policies and is obligated to keep the same in full force and effect under the terms of the contract between it and the Plaintiff.

(2) That the Court enter a mandatore [sic] injunction ordering the Defendant to reinstate the insurance policies terminated by it as heretofore alleged.

(3) That plaintiff be granted judgment against defendant on behalf of any of its members in the amount of any loss suffered by them as a result of the termination of said insurance policies by Defendant.

(4) That plaintiff be granted any other relief to which it may be entitled, including its costs herein.

Vogel, Heis & Vogel
/s/ Cedric Vogel
1904 Carew Tower
Cincinnati, Oho 45202
Telephone 421-4225
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION AFL-CIO, Local 11, 5578 Montgomery Road, Cincinnati, Ohio 45212
Plaintiff

vs.

KURZ-KASCH, INC., 1421 South Broadway, Dayton, Ohio
Defendant

STIPULATION

(Filed January 26, 1977)

It is stipulated between counsel for plaintiff and defendant as follows:

1. Exhibit A attached hereto is a true and correct copy of the collective bargaining agreement between the plaintiff and the defendant for the period of September 15, 1973, to September 14, 1975.

2. Exhibit B is a true and correct copy of Group Life Insurance Policy issued by Federal Kemper Life Assurance Company No. PF 13746, dated June 1, 1975, to Kurz-Kasch, Inc.

3. Exhibit C is a true and correct copy of Group Contract issued by Blue Cross of Southwest Ohio-Ohio Medical Indemnity, Inc. to Kurz-Kasch, Inc. dated March 3, 1972, and application for a Group Contract

made to Blue Cross of Southwest Ohio by Kurz-Kasch, Inc., dated March 30, 1972.

4. Exhibit D is a true and correct copy of Certificate of Contract for Indemnity Benefits issued by Ohio Medical Indemnity, Inc. subject to the terms of the Group Contract described in Exhibit C.

5. Exhibit E is a list of names of persons retired from employment with the defendant, together with their addresses and ages. All of said persons were covered by the group contracts listed in Exhibits B and C.

6. The collective bargaining agreement listed in Exhibit A expired on September 15, 1975. Prior to such date and thereafter the parties negotiated for a new collective bargaining agreement. The negotiations reached an impasse resulting in Federal Mediation. After negotiating the possibility of closing its plant, the Board of Directors of defendant corporation voted to permanently close the plant at 1421 Broadway, Dayton, Ohio, where the members of the plaintiff union were employed. The plant was closed with no new collective bargaining agreement having been entered into by the parties. Plaintiff was notified that the life insurance contracts on all retired members, formerly employed by defendant, would be terminated as of January 1, 1976, and all Blue Cross and Blue Shield coverage would be discontinued as of February 1, 1976. Said contracts of life insurance and health care policies as to retired employees were discontinued by the defendant on the dates mentioned above.

7. The defendant corporation continues in business with the same telephone number and with a plant in

operation in Dayton and plants in two other locations in Ohio, all of which were in existence and operation prior to and at the time of the closing of the South Broadway plant.

Vogel, Heis & Vogel
by /s/ Cedric Vogel
Cedric Vogel
Attorney for Plaintiff
Young & Alexander
by /s/ Frederick N. Young
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff

vs.

KURZ-KASCH, INC.,
Defendant

ORDER

(Filed April 5, 1977)

This matter is before the Court upon the parties' cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff Metal Polishers, Buffers, Platers & Allied Workers Local 11 brings this action on behalf of its members, former employees of the defendant Kurz-Kasch, Inc. The last collective bargaining agreement entered into by the parties was in effect from September 15, 1973, to September 14, 1975. Article XIV of that agreement provided for the payment by the company of group life insurance premiums for retirees. The company agreed to pay for 50% of the premiums for employees who retire at the age of 62 with 10 years of continuous employment, and to pay the full premium for employees who retire at the age of 62 with 15 years of continuous employment.

The agreement also contained a five step grievance procedure for "any Employee or group of Employees covered by this Agreement" who believe "that he or they have been unjustly dealt with or that any provision of this agreement has been or is being violated.

The union and company were unable to reach a new agreement upon the expiration of the old agreement in 1975. The company informed the union that it was closing its plant in Dayton, Ohio, and that it was discontinuing all payment of insurance premiums for retirees.

The parties' well-prepared briefs raise a basic question: Whether under the expired collective-bargaining agreement certain employees obtained a vested right to have the company pay their insurance premiums despite the contract's expiration.

Both parties agree that this issue is arbitrable. The parties also seem to agree that this case falls squarely within the holding of *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 45 U.S.L.W. 4251 (decided March 7, 1977). In that case the union argued that a right to severance pay had vested under an expired

contract. The Court held that this dispute was within the broad scope of the arbitration clause in question, and that the duty to arbitrate survived the contract's expiration.

It would be both unwise and improper for this Court to usurp the role of the arbitrator and decide the contractual dispute presented in this case. As was stated in *Nolde Brothers, Inc.*:

> By their contract the parties clearly expressed their preference for an arbitral, rather than a judicial interpretation of their obligations under the collective-bargaining agreement . . . Indeed, it is because of his special expertise and selection by the parties that courts generally defer to an arbitrator's interpretation of the collective-bargaining agreement . . .

Since the *Nolde Brothers* decision clarified what had been an uncertain area of labor relations law, we do not believe that the Union acted unreasonably in pursuing a remedy in the courts rather than through the grievance procedure. The fact that no grievance was filed and that the time limits for filing a grievance have expired presents no bar to submission of this dispute to an arbitrator. *NCR Employees Independent Union v. National Cash Register Co.*, 489 F.2d 716 (6th Cir. 1973), *cert. den.*, 416 U.S. 970 (1974).

Accordingly, the parties are hereby ordered to proceed with arbitration of this dispute. This matter is hereby stayed pending the arbitator's decision.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-76-184

Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11,
Plaintiff,

vs.

Kurz-Kasch, Inc.,
Defendant.

JUDGMENT

(Filed April 5, 1977)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that parties are hereby ORDERED to proceed with arbitration of this dispute. This matter is hereby stayed pending the arbitrator's decision.

Dated at Dayton, Ohio, this fifth day of April 5, [sic] 1977.

/s/ John D. Lyter
Clerk of Court
By: /s/ C. Makley
C. Makley, Deputy

IN THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS, INTERNATIONAL UNION, AFL-CIO LOCAL 11,
Plaintiff

vs.

KURZ-KASCH, INC.,
Defendant

ORDER

(Filed April 19, 1978)

This matter is before the Court upon the motion of Paul Weimer for reconsideration of the order of January 12, 1978, denying his motion to intervene.

Upon review of Weimer's memorandum, the Court concludes that his intervention in this action would not be appropriate. If he has rights which he wishes to assert, he must commence a separate suit.

Accordingly, the motion for reconsideration is hereby DENIED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-76-184

9-6-78 Denied /s/ Rubin J

METAL POLISHERS, BUFFERS, PLATERS and ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

vs.

KURZ-KASCH, Inc.,
Defendant.

MOTION OF PLAINTIFF TO AMEND JUDGMENT

(Filed September 5, 1978)

Plaintiff moves the court to amend its judgment entered April 5, 1977 to read as follows:

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that parties are hereby ORDERED to proceed with arbitration of this dispute without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration, and this matter is hereby stayed pending the arbitrator's decision.

/s/ Cedric Vogel
Cedric Vogel
500 Atlas Bank Building
Cincinnati, Ohio 45202
421-4225
Attorney for Plaintiff

CERTIFICATION

The undersigned certifies that a copy of the above motion was served upon Frank H. Stewart, attorney for the defendant, by ordinary mail this 4th day of September, 1977 at his office, 600 Dixie Terminal Building, Cincinnati, Ohio 45202.

/s/ Cedric Vogel

MEMORANDUM

The above wording is required by the Court of Appeals in its decision in the case of *NCR Employees Independent Union v. National Cash Register Co.*, 489 F. 2d 716 (1973).

UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS and ALLIED WORKERS INTERNATIONAL UNION,
AFL-CIO, Local 11,
Plaintiff,

vs.

KURZ-KASCH, Inc.,
Defendant.

JUDGMENT

(Filed September 11, 1978)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the motion for reconsideration of the judgment entered April 5, 1977 is hereby DENIED.

Dated at Dayton, Ohio, this 11th day of September, 1978.

John D. Lyter
Clerk of Court
By: /s/ Rebecca E. Anderson
Rebecca E. Anderson, Deputy

EXCERPTS

from

TRANSCRIPT OF PROCEEDINGS

In the Matter of
Arbitration between

KURZ-KASCH, INC.

and

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS, INTERNATIONAL UNION AFL-CIO, LOCAL 11

* * *

[7] MR. STEWART: Mr. Chapman, as we see it, there are two issues before you. One was the subject of the letter which I directed to you dated August 30, with a copy to Mr. Vogel and that issue is whether or not this issue has been properly processed under the grievance and arbitration procedures.

Now, it is plain to you from Joint Exhibits 5 and 6 that there was a contest between the parties as to the arbitrability of this dispute; that the Federal Courts ruled against the Company's claim in this connection and directed that the matter be taken up before arbitration. Now, simultaneously, I cited and quoted to you in my letter the provision whereby any dispute as to timeliness or procedural arbitrability must be decided by you within two hours after that matter is presented to you. I would assume from reading it, although I do not know, that the purpose of that was so that if the procedural matter was decided in the Company's favor, that would end the arbitration. If it was not, it would go on to the merits.

Counsel and I had a conference yesterday [8] afternoon with Federal Judge Rubin concerning the scope of his order and we have agreed and have represented to the Court that we would not interpose the procedural question as a bar to your consideration of the merits of the issue and we also represented to the Court and represent to you that we will not insist upon a ruling within two hours following our procedural testimony, which you may receive.

In short, you not only may, but we urge that you receive testimony and take that evidence as to the procedural question as well as the substantive question and we so represented to the Federal Court yesterday afternoon and we so represent it to you today.

* * *

In the Matter of the Arbitration Between

KURZ-KASCH, INC., Dayton, Ohio

and

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS, INTERNATIONAL UNION Local 11, AFL-CIO

RE: FMCS No. 78K13752

OPINION AND AWARD

The undersigned Arbitrator was appointed by the Director of the Federal Mediation and Conciliation Service to hear and decide the above matter in dispute between the parties. Pursuant to notice, hearing was held on September 6, 1978, at the Company offices in Dayton, Ohio, beginning at 9:30 a.m.

A transcript of the hearing was taken.

Post-hearing briefs were filed and received by the Arbitrator on November 3, 1978.

APPEARANCES

For the Company

Frank H. Stewart, Esq.
Jeff Kelly, Esq.
Taft, Stettinius & Hollister
Cincinnati, Ohio 45202

For the Union

Cedric Vogel, Esq.
Vogel, Heis and Vogel
Cincinnati, Ohio 45202

Robert L. Davidson
Eleanora Stahl

BACKGROUND

The Company had operated a plant at South Broadway in Dayton, Ohio, for approximately 50 years. The principal products were thermoset plastic component parts. There were four International Unions representing different groups of employees. Of the four, only the Metal Polishers International Union, Local 11 is pursuing this case and hereinafter will be designated "the Union."

The Company and the Union had had a series of collective bargaining agreements over the years culminating in the last contract between the parties which had an effective term from September 15, 1973, through September 14, 1975.

On July 8, 1975, the Company notified the Union by letter (Jx-15) that all agreements between the parties would terminate on September 15, 1975, the expiration date of the contract. As the expiration date approached, efforts were made by both parties to negotiate a new contract but to no avail.

At the expiration of the contract, the Union went on strike September 15, 1975. Several meetings were held at which a Federal Mediator was present but again to no avail. The Company permanently closed its South Broadway facility on November 17, 1975.

By letter dated December 16, 1975 (Jx-13), the Company informed the retired employees that effective January 1, 1976, the group life insurance on all retired personnel would be discontinued, and effective February 1, 1976, the Company would no longer pay the Blue Cross/Blue Shield premiums for retirees.

As to the termination of the insurance policies for the retirees, the Union President gave the Company a letter of protest dated December 18, 1975 (Jx-14).

Termination of the policies with respect to the payment of premiums for all other employees, hourly as well as salaried, was effective as of the termination of the then current contract.

The Company did agree to obtain continued coverage on these policies for retired personnel upon their paying the full premiums in accordance with the provisions of the policies governing such conversion rights.

The Union proceeded to file suit in the Federal District Court for the Southern District of Ohio, Western Division against the Company seeking a declaratory judgement, injunction and damages. The suit asked for a declaratory judgement finding that the defendant had unlawfully

terminated the group insurance policies and is obligated to keep them in full force and effect under the terms of the contract, and that the defendant be ordered to reinstate the said policies and the plaintiff be granted against defendant in the amount of any loss suffered by retired employees as a result of the termination of said policies by the defendant.

Upon the submission of the case to the Court upon cross motions for summary judgment, the Court (Rubin, J.) referred the matter to arbitration, as per his Order and the Order overruling the motion of defendant for reconsideration (Jx-4 & 5). The Company appealed this order to the Court of Appeals but because it was not a final order, the appeal was dismissed.

Thus, the matter is before me for decision.

GRIEVANCE

There was no formal grievance filed and there is some dispute as to whether the matter is a grievance within the meaning of the contract. For purposes of simplicity, I will refer to it as a grievance.

PERTINENT CONTRACT PROVISIONS (Jx-1)

ARTICLE VI - GRIEVANCES

. . .

The Employees, represented by the Union, from among themselves, shall elect a Shop Committee, consisting of not more than five (5) members or such other number as may at any time be agreed upon by the Company and the Union. The Shop Committee, together with a representative of the Union whenever the Shop Committee deems such representation necessary, shall act as bargaining unit for the Employees represented by the Union in matters considered to

affect such Employees under the terms and conditions of this Agreement. The Company agrees to meet with the Shop Committee of the Union at such times and places as shall be mutually agreed upon and as soon as reasonably possible after request for such meeting has been made by any party hereto.

Should any Employee or group of Employees covered by this Agreement believe that he or they have been unjustly dealt with or that any provision of this Agreement has been or is being violated, such matters shall be taken up as follows for prompt and uniform determination:

Step 1. The matter shall be taken up with the Foreman by the Employee with the assistance of the Shop Committeeman on that shift, or by the Union if it is a Union grievance. The Foreman will endeavor to adjust it. Such matters shall be taken up with the Foreman within two (2) working days after the Employee or the Union, whosoever grievance it is, acquired knowledge of it, provided, however, that, except in the case of error in determining Employee compensation, all grievances must be presented within twenty (20) days after the occurrence of the supposed cause for such grievance, and if such grievance is not so presented within such twenty (20) days, such grievance will not be considered by the Company or the Union, unless it is an error in determining Employee compensation. The Foreman shall give an answer to the person who presented the grievance within two (2) working days after it has been called to his attention.

Step 2. In the event the matter is not settled in an acceptable manner by the Foreman, it may be referred to the Shop Committee. If the Committee

decides that it is a legitimate grievance, the grievance shall be reduced to writing, and signed by the Employee making the grievance, a copy of which shall be given to the Foreman. The case may then be taken up by the Committee with the Plant Superintendent of the Company. The case must be submitted to the Superintendent within two (2) working days after the decision of the Foreman, and must be determined by the Superintendent within two (2) working days after such submission to him. The Superintendent's answer will be given to the Union in writing.

Step 3. If the case is not satisfactorily adjusted by the Superintendent, it may be taken up by the Committee to the Management of the Company or its designated representative. The case must be submitted by the Committee to Management within two (2) working days after the Superintendent's decision, and the Management must render its decision within two (2) working days after such submission. Management's answer must be given to the Union in writing.

Step 4. Any grievance which has not been answered to the satisfaction of the Union shall, at the request of the Union, be arbitrated. Request for arbitration shall be made within five (5) working days after the decision of the Company in Step 3, has been received or should have been received. The Union shall serve notice to the Company of its intent to arbitrate.

. . .

No arbitrator may change or add to any provision of this Contract. The decision of the arbitrator shall be final and binding upon both parties, and shall be com-

plied with within five (5) working days or longer if necessary after the decision is rendered.

. . .

It is mutually understood and agreed that such . . . arbitrator shall have jurisdiction only to interpret the contract between the Company and the Union, or to apply provisions of such contract to the determination of facts alleged to constitute a grievance, but shall have no jurisdiction or right to amend the terms or provisions of such contract.

. . .

The time limits set forth in the provisions of this Article may be extended by mutual consent of the parties

. . .

The Company recognizes that the committeemen or a Union Representative has the right to present the grievance when it involves a group of Employees or the Union . . . Grievances of this nature will be submitted to the Superintendent in writing at Step 2.

ARTICLE XIV - GROUP INSURANCE

1. The Company shall pay not less than fifty percent (50%) of all group insurance premiums required with respect to group insurance plans presently in effect or any future insurance plans hereafter agreed to between the Company and the Union.

. . .

3. It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to such age by reason of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who has (six) ten (10) years continuous em-

ployment by the Company, may, upon retirement continue their participation in existing group insurance plans applicable to such Employee by paying fifty percent (50%) of the premium required for the continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-two (62) years of age or over, or who retires prior to such age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who has fifteen (15) years or more continuous employment by the Company and who retires from active employment. It is understood and agreed that such insurance premium payment provisions shall continue only so long as such employees are, in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases.

. . .

ARTICLE XXIIII - TERM

This Agreement shall be effective as of September 15, 1973, and shall remain in effect until 12:00 o'clock P.M. on September 14, 1975, and thereafter for successive periods of one (1) year each, subject to termination by either pary (sic) hereto at the end of the original term or at the end of any such additional year upon sixty (60) days written advance notice to the other party of intent to terminate this Agreement or to amend or modify any of the terms or conditions hereof at the end of any such period. In the event of the giving of any such notice to terminate or amend this Agreement at the end of the original

or any succeeding term hereof, this Agreement and all terms and conditions hereof shall terminate as of the end of the term in which such notice was given.

OTHER RELEVANT MATTERS

COURT ORDERS

Order, dated April 5, 1977 (Jx-5)

JUDGMENT

. . .

It is Ordered and Adjudged that parties are hereby ORDERED to proceed with arbitration of this dispute. This matter is hereby stayed pending the arbitrator's decision.

(s) C. Makley, Deputy Clerk

ORDER

This matter is before the Court upon the parties' cross motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Plaintiff Metal Polishers, Buffers, Platers & Allied Workers Local 11 brings this action on behalf of its members, former employees of the defendant Kurz-Kasch, Inc. The last collective bargaining agreement entered into by the parties was in effect from September 15, 1973, to September 14, 1975. Article XIV of that agreement provided for the payment by the company of group life insurance premiums for retirees. The company agreed to pay for 50% of the premiums for employees who retire at the age of 62 with 10 years of continuous employment, and to pay the full premium for employees who retire at the age of 62 with 15 years of continuous employment.

The agreement also contained a five step grievance procedure for "any Employee or group of Employees covered by this Agreement" who believe "that he or they have been unjustly dealt with or that any provision of this agreement has been or is being violated."

The union and company were unable to reach a new agreement upon the expiration of the old agreement in 1975. The company informed the union that it was closing its plant in Dayton, Ohio, and that it was discontinuing all payment of insurance premiums for retirees.

The parties' well-prepared briefs raise a basic question: Whether under the expired collective-bargaining agreement certain employees obtained a vested right to have the company pay their insurance premiums despite the contract's expiration.

Both parties agree that this issue is arbitrable. The parties also seem to agree that this case falls squarely within the holding of *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 45 U.S.L.W. 4251 (decided March 7, 1977). In that case the union argued that a right to severance pay had vested under an expired contract. The Court held that this dispute was within the broad scope of the arbitration clause in question, and that the duty to arbitrate survived the contract's expiration.

It would be both unwise and improper for this Court to usurp the role of the arbitrator and decide the contractual dispute presented in this case. As was stated in *Nolde Brothers, Inc.*:

> By their contract the parties clearly expressed their preference for an arbitral, rather than a

> judicial interpretation of their obligations under the collective-bargaining agreement . . . Indeed, it is because of his special expertise and selection by the parties that courts generally defer to an arbitrator's interpretation of the collective-bargaining agreement . . .

Since the *Nolde Brothers* decision clarified what had been an uncertain area of labor relations law, we do not believe that the union acted unreasonably in pursuing a remedy in the courts rather than through the grievance procedure. The fact that no grievance was filed and that the time limits for filing a grievance have expired presents no bar to submission of this dispute to an arbitrator. *NCR Employees Independent Union v. National Cash Register Co.*, 489 F.2d 716 (6th Cir. 1973), *cert. den.* 416 U.S. 970 (1974). Accordingly, the parties are hereby ordered to proceed with arbitration of this dispute. This matter is hereby stayed pending the arbitrator's decision.

(s) Carl B. Rubin, United States District Judge

Order, dated May 4, 1977 (Jx-6)

ORDER

This matter is before the Court upon the defendant's motion for reconsideration of an order issued by this Court on April 5, 1977, requiring the parties to proceed to arbitration.

Defendant argues that the Union's claim is time-barred under the contract. Normally, failure to file a timely grievance is fatal to an employee's claim. *See, Chambers v. Beaunit Corporation*, 404 F.2d 128 (6th Cir. 1968); *Amalgamated Clothing Workers v. Ironall Factories Co.*, 386 F.2d 586 (6th Cir. 1967). However,

we read *N.C.R. Employees' Independent Union v. National Cash Register Co.*, 489 F.2d 716 (6th Cir. 1973), *cert. den.* 416 U.S. 970 (1974), as creating a very narrow exception to this rule where unusual circumstances are presented.

As was stated in this Court's prior order, the *Nolde Brothers* decision resolved what had been a confused area of the law. *See, e.g., Chattanooga Mailers Union Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1311 (6th Cir. 1975). When the parties' agreement expired in September of 1975, the Union could have reasonably considered the courts to be their sole forum for deciding this dispute. Under these circumstances, we believe that the holding in the N.C.R. Employees case is directly applicable.

Accordingly, defendant's motion is hereby DENIED.

It is so ORDERED.

(s) Carl B. Rubin, United States District Judge.

Company Letter to Union, dated 7/8/75 (Jx-15)

Dear Mr. Wilburn:

You are hereby notified that as of September 15, 1975, any agreement - written, oral or implied - or any conditions of employment or other understanding now in effect between Kurz-Kasch, Inc. and the Metal Polishers, Buffers, Platers and Allied Workers International Union, Local #11, will terminate.

We hereby offer to meet with you for the purpose of negotiating an agreement with respect to wages, hours, and other terms and conditions of employment.

(s) Fred F. Delaney, Director of Personnel

Union Letter to Company, dated 7/9/75 (Jx-15)

Dear Mr. John Taylor:

In accordance with the present agreement existing between your company and our union this letter will serve as our desire to reopen the agreement for the purpose of some changes and modification.

We will contact you in the near future for the purpose of setting up a meeting with you so that we can present you with our proposed changes.

(s) Mrs. Elinora Stahl, President

Company Letter to Stockholders, dated 11/17/75 (Jx-12)

The company has decided to close its plant at 1421 South Broadway in Dayton, Ohio.

This action was taken by the Board of Directors in a meeting held today, and the closing became effective immediately.

This plant is currently in the ninth week of a strike led by the same union that shut down the plant two years ago for 17 weeks at a cost to the company and shareholders in excess of $400,000. The company could see no end to the current strike in the foreseeable future.

The issues of the strike were economic, and the company is convinced that there is no point in operating a facility that cannot manufacture its products at a competitive cost.

This strike, in fact, is the third one at this plant in the last seven years, and in the last few weeks we have begun to hear from some of our major and most

important customers that in view of the frequent and prolonged strikes at the South Broadway plant they would not allow their molds to be placed in that plant again, even if the strike were settled soon.

We have been maintaining production very successfully during the strike at our other four plants, and the closing of the aging facility at South Broadway in Dayton will, in the opinion of management and the Board of Directors, only serve to strengthen the company. In fact, we expect to show a return to profitability this year on sales of approximately $9,000,000. Our new corporate headquarters is now located at 1501 Webster Street, P. O. Box 1246, Dayton, Ohio 45401, and we encourage you to write us if you have any particular questions about the closing of this one plant or anything else concerning the company.

(s) John N. Taylor, Jr., President

Robert L. Davidson, Chairman

Company Letter to Retirees, dated 11/16/75 (Jx-13)

The cost of carrying insurance on retired personnel has increased to the level where Kurz-Kasch can no longer afford to continue to include retirees in our group plan.

Effective January 1, 1976, life insurance on all retired personnel will be discontinued, and effective February 1, 1976, you will no longer be included in our Blue Cross/Blue Shield plan.

I am sorry that this action is necessary, but it is unfortunately one of those side effects of the enforced closing of the South Broadway plant. I would urge each of you to explore the various private and government medical plans available to you. If you need

assistance in this area, please contact the undersigned at (513) 223-8161 and I will help in any way I can.

(s) Fred F. Delaney, Director of Personnel

Union Letter to Company, dated 12/18/75 (Jx-14)

We are protesting the termination of the insurance for the retired employees.

You are in complete violation of there [sic] rights. This matter has been turned over to our attorney, Cedric Vogel, who will contact you soon.

(s) Elinora Stahl, President

CONTRACT NEGOTIATION PROPOSALS

Company Proposal to Union, dated 9/5/75 (Cox-1)

. . .

8. ARTICLE XIV. Changed to provide:

A. The Company will pay full group insurance premium payments for employees on sick leave for the first fourteen (14) weeks of sick leave in any one (1) consecutive year, provided the Company's physician validates the illness and concurs with the length of leave necessary.

B. During personal leaves of absence, the employee may continue his group insurance by making provisions with the Personnel Office for *advance* payments for the entire amount.

C. It is agreed that employees who are sixty-two (62) years of age or over, or who retire prior to that age by reason of such disability as entitled the employee to disability benefits under the Federal Social Security Law, and who have fifteen (15) years continuous employment with the Com-

pany, may, upon retirement, continue their participation in existing group insurance plans applicable to such employee (only the employee) until reaching age sixty-five (65) with the exception that the Life Insurance coverage for said employee will be reduced to the amount of $2,000.00, for ten (10) years after such retirement at no expense to the employee.

. . .

Union Proposal to Company, dated 9/15/75 (Cox-3)

. . .

9. Art. XIV - Pay premiums on personal leave a month in advance.

. . .

. . .

PERTINENT INSURANCE POLICY PROVISIONS

Life Insurance (Jx-2)

Termination of Insurance

The insurance for any Insured Employee will terminate on the first of the month coincident with or next following: the earliest of the following dates: . . . (b) the date ending the last period for which the premium of the Insured Employee's insurance was paid by the Policyholder when due . . . . (e) with respect to a specific coverage, the date on which the inclusion of that coverage is discontinued . . . (f) the date of termination of this Policy.

Blue Cross (Jx-3)

7. Termination of the Contract.

(a) The . . . Employer may terminate this Contract, without cause, effective on any Anniversary

Date of this Contract by giving written notice of termination to the other party at least thirty (30) days before such anniversary date . . .

. . .

11. The Contract; Its Interpretation.

. . . All employees and their eligible family members enrolled under this Contract shall have only the rights and benefits, subject to the terms and conditions, set forth herein.

Ohio Medical Indemnity, Inc. (Jx-4)

Article VII - Termination of Employee's Coverage

. . .

5. Coverage of Employee and all of the Members of his Family, if any, shall terminate automatically upon the termination of the Group Contract.

ISSUES

The Company raised the question as to the arbitrability of the grievance, so there is the issue of arbitrability and as to the merits of the case.

No. 1. Is the request for arbitration procedurally defective?

No. 2. Is the Company contractually bound to continue to pay such group insurance premiums as are specified in Article 14 of the parties' collective bargaining agreement, which agreement expired on September 14, 1975, where said Article 14 states that retired employees may continue their participation "in existing group insurance plans"?

DISCUSSION AND FINDINGS

The contract contained a provision that if the question as to the arbitrability of a grievance was raised at the hearing, the Arbitrator was required to render his decision as to its arbitrability within two hours after evidence was presented on the question.

This requirement was waived by the parties and evidence was taken on both the question of arbitrability and on the merits.

It should be noted that this grievance does not involve the entitlement of retirees to pension benefits. A fully funded pension plan is in effect and retirees are receiving pension benefits thereunder. This case involves only the question of the Company's obligation to continue to pay the premium for life, hospital and medical insurance for retirees.

THE ARBITRABILITY OF THE GRIEVANCE

There was no grievance filed in this case. The Union felt that, since the contract had expired and the Company had closed the plant, the proper avenue for relief was to pursue the matter as a civil action in the Federal District Court. The Company was made party defendant, hearing was held and Judge Rubin ordered that the matter be referred to arbitration. The Company filed a motion for reconsideration of Judge Rubin's order arguing that the Union's claim is time-barred under the contract. This motion was denied by the court for reasons set out in Jx-6 supra.

The Company argues that Judge Rubin's orders allow this Arbitrator to consider the questions of both arbitrability and the merits.

The Union argues that the court's orders clearly show that the Union should not be penalized for not taking the arbitration route initially and that the orders require a decision on the merits. I think a fair reading of the court's order of May 4, 1977 (Jx-6), would substantiate the Union's position. It seems clear to me that the court intended that the Arbitrator should address himself to the merits of the case.

Aside from the court decision, I would reach the same conclusion.

The contract between the parties expired on September 14, 1975, and there was no renewal. The Company permanently closed the plant on November 17, 1975. Notice was given on December 16, 1975, to retirees that the Company would no longer pay premiums for Life, Hospital and Medical Insurance for retirees as of certain dates (Jx-13). Two days later on December 18, 1975, the Union notified the Company (Jx-14) that it would contest the Company's action.

It is obvious that subsequent to the termination of the contract and the closing of the plant, the normal avenues for processing grievances were not available. It was not until the Company's December 16 letter that the Union had cause to contest the Company's action. The Union's prompt response on December 18 was sufficient timely compliance with the time requirements of the contract under these circumstances.

Thus, I find that the grievance is arbitrable.

ON THE MERITS

The payment of premiums by the Company for Life, Hospital and Medical Insurance for employees and retired personnel was a part of the "economic package" agreed to by the parties in their last contract (Jx-1 supra).

A brief review of how collective bargaining works might be helpful to the understanding of this case.

When a Company and a Union are negotiating for a contract, the Union ordinarily presents its proposals to the Company on non-economic and economic matters. Non-economic might be for changes in the seniority section, grievance procedure or other items which do not require the Company to pay out money. The economic package consists of increases in wages, additional fringe benefits, such as, life insurance if such has not been agreed to before, or maybe an increase in the benefit, such as providing a policy worth $4,000 instead of $2,000 if life insurance has been provided before.

When the Company receives these economic proposals, it sets about to determine the additional cost of each item and the collective cost of them over the term of the contract.

The Company then makes counter proposals to the Union. For example, it may propose that a new benefit such as Sickness and Accident would become effective in the third year of a three year contract and thus decrease the cost impact over the three year term. The bargaining is a tough process with give and take by both sides. The Company has to know the cost of the economic package over the term of the contract so it can price its product accordingly.

There is no need to belabor this any further. The point of the above is to show that the parties are involved in and concerned with the cost of the total package over the term of the contract. Their basic intent is for the Union to be assured of the benefits agreed to during the term and the Company to be obligated to pay the costs of those benefits during the terms.

If there are any costs that would continue beyond the term of the contract, they would have to be clearly spelled out in the contract or be reasonably inferred from the language of the contract.

This calls for an examination of the contract language. The language to be considered is found in Article XIV - Group Insurance (Jx-1, supra). Section 1 of Article XIV states:

> "The Company shall pay not less than fifty percent (50%) of all group insurance premiums required with respect to group insurance plans *presently in effect or any future insurance plans hereafter agreed to between the Company and the Union.*" (Emphasis added)

Section 3 of Article XIV states in pertinent part: "Employees . . . *may,* upon retirement continue their participation in *existing* group insurance plans . . . ." (Emphasis added)

Reading Sections 1 and 3 together the conclusion is that the language "existing plans" in Section 3 are plans "presently in effect" as set forth in Section 1. This means that the plans in the last contract imposed an obligation on the Company to pay only premiums for the duration of the contract term.

When the contract ended on September 14, 1975, without renewal, the plans could be terminated at any time by nonpayment of the premiums by the Company. The Company had a legitimate right to do this.

The Union's basic argument is that somehow the right of retirees to continue to have the Company pay these premiums is a *vested* right based on an assumption that the promise to pay these premiums during their retirement constituted an inducement for them to continue in

their employment with the Company until the retirement date.

There is no language in the contract which gives the retirees a vested right to these insurance benefits. Further, there is no language in the contract from which it could reasonably be inferred there was a vesting.

In its brief, the Union cited a number of court decisions both state and Federal as well as arbitral where the decision was that a vesting had occurred. Many of these related to pension rights which are not involved in this case. I am not conversant with the facts and evidence of the cited cases to be able to determine whether or not they are squarely in point with this case.

As an Arbitrator, I am only concerned, in this case, with the interpretation of the contract the parties agreed to and the evidence submitted at the hearing which woudl [sic] have a bearing on its interpretation.

As to the contract, as stated above, I find no support of the Union's contention that a vesting occurred.

As to the evidence, it revealed there was no discussion during negotiations or during the conferences with the Federal Mediator, or when the Company closed the plant of the right of retirees to continue to receive these insurance benefits. There was no contesting of the Company's right to discontinue the insurance benefits for regular employees when the contract ended and the plant was closed.

The evidence, which was unrebutted, did show that in previous negotiations for contracts, that the Union informed the Company that retirees wanted to have the same benefits that were to be negotiated for the members of the bargaining unit. This would lead to the conclusion that, in bargaining for the insurance programs, the re-

tirees obtained no benefits greater than those that were accorded to the then present employees of the bargaining unit.

Thus, when the insurance benefits for regular employees ended with the termination of the contract, those benefits also ended for retirees.

In this connection, the Company had notified the Union by letter dated July 8, 1975 (Jx-15, supra), that "as of September 15, 1975, any agreement - written, oral or implied - or any condition of employment or other understanding now in effect between Kurz-Kasch, Inc. and the Metal Polishers, Buffers, Platers and Allied Workers International Union, Local #11 will terminate."

The Union's letter to the Company dated July 9, 1975, expressing its desire to negotiate for a new contract did not mention a "vested right" for retirees. In fact, the evidence shows that the parties had never contemplated or discussed the question of the retiree's having a vested right to insurance coverage.

The Union also offered evidence to show that a committment had been made by the Company to provide insurance coverage for retirees for the rest of their lives. The first part of this presentation consisted of the testimony of a retiree of another Union of the Company that she had received a letter dated July 16, 1962, from the then Personnel Director, who has since died, to the effect that the Company had approved the full premium payment on her life insurance until her death. Another Union witness, a member of the Union involved in this case, testified that she had received a similar letter, but no letter was produced. The Company objected to this offering but I admitted it for whatever weight it might have.

I find that it has no weight at all as far as being a committment by the Company under this contract.

The second part of the presentation consisted of testimony that the Personnel Director had told certain employees that they would be covered for life. The testimony in this regard was rather sketchy and it seems to me that, if such statements were made, they would constitute only the opinion of the Personnel Director based on the belief these programs would be carried on through successive contracts with the Union.

There was no evidence at all that the Personnel Director had the authority to commit the Company to the future payment of insurance premiums that were not agreed to in the contract.

To summarize, there is no language in the contract that would give to retirees a vested right to Company paid insurance programs after their retirement.

There is no language in the contract from which it could reasonably be inferred that the Company is obligated to pay these premiums.

There is no evidence to show that the parties ever contemplated or discussed the Company's obligation to pay these premiums for life, after retirement.

Article VI, Step 4 (supra), agreed to by the parties, limits my authority and jurisdiction in this case. I cannot add language to the contract that would support the Union's position.

In view of the above, I find that the case is arbitrable and that the grievance must be denied.

An Award will be made to this effect.

AWARD

1. The grievance is arbitrable.
2. The grievance is denied.

/s/ Chas. P. Chapman
Charles P. Chapman
Impartial Arbitrator

AWARD made at Portsmouth, Scioto County, Ohio
December 28, 1978

CHARLES P. CHAPMAN
Attorney At Law
Arbitrator

2200 Timlin Hill Phone (614) 353-8760

PORTSMOUTH, OHIO 45662

January 25, 1979

Cedric Vogel, Esq.
Vogel, Heis and Vogel
500 Atlas Bank Building
524 Walnut Street
Cincinnati, Ohio 45202

Re: Kurz-Kasch, Inc. and
Metal Polishers Union
FMCS No. 78K13752

Dear Mr. Vogel:

This will acknowledge receipt of your letter of January 15, 1979, relative to the above case.

You are correct in pointing out the omission of certain language in the quotation of Article XIV, paragraph 3 of the collective bargaining agreement set out on page 5

of the Opinion and Award. The omission was inadvertant by my secretary and I regret that it was not detected before mailing.

The correct wording of Paragraph 3 should have been:

3. It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to such age by reason of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who has ten (10) years continuous employment by the Company, may, upon retirement continue their participation in existing group insurance plans applicable to such Employee by paying fifty percent (50%) of the premium required for *such insurance. The Company agrees to pay all such group insurance premiums required for* the continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-two (62) years of age or over, or who retires prior to such age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who has fifteen (15) years or more continuous employment by the Company and who retires from active employment. It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees are, in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases.

NOTE: The missing language is italicized.

As to the other matters set out in your letter, it is a general rule that when arbitrators have executed their awards and declared their decision, they are "functus officio" and have no power to proceed further. Thus, I am not permitted to comment further as to my Opinion and Award in this case.

However, clerical mistakes can be corrected and all interested parties will be given this correction. I thank you for calling it to my attention.

I do appreciate your frank comments set out in your letter.

Yours truly,

/s/ Chas. P. Chapman
Charles P. Chapman

CPC:mcf

cc: Frank H. Stewart, Esq.
Taft, Stettinius & Hollister

IN THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS & ALLIED WORKERS INTERNATIONAL UNION LOCAL 11,
Plaintiff,

vs.

KURZ-KASCH, INC.,
Defendant.

ORDER

(Filed February 21, 1979)

By previous Order of this Court the above matter was referred to arbitration for disposition. It now appearing that an arbitrator's decision has been rendered, the above-entitled matter is hereby DISMISSED. Each party to bear its own costs.

It is so ORDERED.

Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
AT DAYTON

Case No. C-3-78-173

(Class Action - Jury Demand)

PAUL W. WEIMER, on his own behalf and on behalf of other former employees of KURZ-KASCH, INC., 1680 Hillwood Drive, Dayton, Ohio 45439,
Plaintiff,

vs.

KURZ-KASCH, INC., 1501 Webster Street, Dayton, Ohio 45404,
Defendant.

COMPLAINT

(Filed June 30, 1978)

Plaintiff, PAUL W. WEIMER, on behalf of himself and other former employees of Defendant, for his Complaint states:

1. This action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185.

2. Plaintiff ("Weimer") is a citizen and resident of the State of Ohio, and County of Montgomery, was employed by Defendant Kurz-Kasch, Inc. ("Corporation") and while employed by the Corporation was represented for purposes of collective bargaining by International Moulders and Allied Workers Union, Local 45.

3. Defendant is a corporation, duly organized under the law and is engaged in business at Dayton, Ohio and other locations within the State of Ohio and at all times relevant was an employer within the meaning of Section 2(2) of the National Labor Relations Act, 29 U.S.C., Section 152 and Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185.

4. Weimer brings this action on behalf of himself and all other former employees of Defendant Corporation, except those employees represented by Metal Polishers, Buffers, Platers and Allied Workers International Union, Local 11 in Case Number C-3-76-184, who are entitled to insurance benefits in accordance with provisions within various collective bargaining agreements signed by the Corporation and provisions within other contracts of employment between the Corporation and former employees.

5. The class consists of all former employees of Defendant Kurz-Kasch, Inc. at the Dayton facility, except those employees represented by Metal Polishers, Buffers, Platers and Allied Workers International Union, Local 11, in Case Number C-3-76-184, who are entitled to insurance benefits from the company by contract but who have been denied said insurance benefits since on or about January 1, 1976.

6. The class consists of approximately forty-five (45) former employees primarily residing in Montgomery County, Ohio.

7. Weimer is co-chairman of an ad hoc organization which represents approximately ninety-five (95) per cent of the class which primarily consists of former employee-members of International Association of Machinists and Aerospace Workers, Local 225 ("Machinists") and Inter-

national Moulders and Allied Workers Union, Local 45 ("Moulders").

8. The alleged question of fact is whether the above stated class of former employees remains entitled to insurance benefits under the expressed language of the collective bargaining agreements of the parties and other related employment contracts between the Corporation and former employees.

9. The alleged question of law is whether an employer's contract to provide insurance benefits to former employees without respect to the status of the company continues in full force and effect following permanent shutdown and transfer of the operations.

10. There are questions of law and fact common to the class, the claims of Weimer are typical of the claims of the class and Weimer, as representative of the class, will fairly and adequately protect the class's interest. Further, prosecution of separate actions by individual members of the class would, *inter alia,* create a risk of (i) adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class, and (ii) adjudications with respect to members of the class which would, as a practical matter, be dispositive of the interests of other class members not parties to the adjudication or substantially impair or impede their ability to protect their interests. In addition, the Defendant has acted or refused to act on grounds generally applicable to the class, and final declaratory relief is appropriate with respect to the class as a whole.

11. Defendant entered into a collective bargaining agreement with the International Association of Machinists and Aerospace Workers, Local 225, on behalf of its members who are within this class. Article XV, Section 105 provides:

It is agreed that Employees who are sixty-two (62) years of age or over or who retire prior to that age by reason of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who have ten (10) years of continuous employment by the Company, may, upon retirement, continue their participation in existing group insurance plans applicable to such Employees by paying fifty (50%) per cent of the premiums required for such insurance. The Company agrees to pay all such group insurance premiums required for continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-five (65) or more and who has fifteen (15) years or more continuous employment by the Company and who retires under normal retirement from active employment. The Company agrees to pay all such group insurance premiums required for continuation of existing Employee group insurance with respect to any Employee who retires prior to age sixty-five (65) years under disability retirement in accordance with Federal Social Security Law from active employment, provided such Employee has fifteen (15) years or more of continuous employment. It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees are, in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved to the Company to pay such further retirement benefits in such cases as it may in its discretion determine advisable in individual cases.

12. Defendant entered into a collective bargaining agreement with International Moulders and Allied Workers Union, Local 45, on July 22, 1974 on behalf of its members

who form an additional portion of this Class. Article XVI, Section 3, provides:

> It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who have ten (10) years continuous employment with the Company, may, upon retirement, continue their participation in existing group insurance plans applicable to such Employee by paying thirty (30%) per cent of the premium required for such insurance (twenty (20%) per cent beginning September 15, 1974). The Company agrees to pay all such group insurance premiums required for the continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-two (62) years or more and who has fifteen (15) years or more of continuous employment with the Company, or who retires prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law and has fifteen (15) years continuous employment with the Company, and who retires from active employment. It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees are, in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases.

13. Prior to January 1, 1976, Defendant maintained group insurance policies under which employees described above were beneficiaries, but on January 1, 1976, Defendant unlawfully, willfully, intentionally and maliciously

terminated said group insurance policies and has refused ever since said date to reinstate the same.

14. As a result of the willful breach of said contracts and the unlawful termination of said group insurance policies by the Corporation, persons coming within the terms of said contract mentioned above who are former employees of the Defendant are without the benefit of said group insurance which the Corporation is obligated to provide pursuant to the terms of the collective bargaining agreements herein stated and other contracts of employment.

15. The relevant collective bargaining agreements contain grievance procedures culminating in binding arbitration.

16. The issue of entitlement to insurance benefits is grievable and arbitrable in accordance with the negotiated grievance procedures.

17. The Moulders Union and Machinists Union have failed to properly represent their members who are the proposed class members.

18. Plaintiff is without any adequate remedy at law.

19. Suit has been instituted by non-members of this proposed class in *Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11 v. Kurz-Kasch, Inc.*, C-3-76-184, and this Court ordered deferral to arbitration on April 15, 1977.

WHEREFORE, Plaintiff demands that:

a) This Court enter judgment finding that the Defendant has unlawfully terminated the above group insurance policies and is obligated to keep the same in full force

and effect under the terms of the contracts between it and the Plaintiff;

b) The Court enter a mandatory injunction ordering the Defendant to reinstate the insurance policies terminated by it;

c) Plaintiff be granted judgment against the Defendant on behalf of the members of the class in the amount of any loss suffered by them as a result of the termination of said insurance policies by Defendant, with interest at six (6%) per cent per annum;

d) Plaintiff be granted punitive damages for said willful breach in the amount of Five Hundred Thousand ($500,000) Dollars;

e) Plaintiff be granted such other relief as is appropriate, including attorneys' fees and costs of this action.

/s/ Robert T. Dunlevey,
Robert T. Dunlevey, Jr.
Trial Attorney for Paul W. Weimer
and
James R. Kirkland
Legler, Lang & Kuhns
1401 Talbott Tower
Dayton, Ohio 45402
(513) 224-7200

JURY TRIAL DEMAND

Plaintiff hereby demands trial by jury on all appropriate issues.

/s/ Robert T. Dunlevey,
Robert T. Dunlevey, Jr.

IN THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
AT DAYTON

Case No. C-3-78-173

PAUL W. WEIMER, et al
Plaintiff

vs.

KURZ-KASCH, INC.
Defendant

MOTION TO EXTEND TIME IN WHICH DEFENDANT MAY ANSWER, PLEAD, OR OTHERWISE MOVE

(Filed July 25, 1978)

The parties, by their counsel, hereby jointly move the Court, pursuant to Rule 3.10, for an Order extending the time in which Defendant may answer, plead, or otherwise move to the Complaint of the Plaintiff to the 20th day after the receipt by Defendant of the award by the Arbitrator in Case No. C-3-76-184, which this Court Ordered to arbitration and which arbitration hearing is being held on September 6, 1978, in Dayton, Ohio.

Respectfully submitted,

Frederick N. Young, Trial
Attorney for Defendant,
Kurz-Kasch, Inc.

Young & Alexander
367 West Second Street
Dayton, Ohio 45402
(513) 224-9291

Robert T. Dunlevey, Jr.
Trial Attorney for Paul W. Weimer, and James R. Kirkland

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MEMORANDUM

The relief sought by the Plaintiff, on behalf of a class, in this case is identical to the relief sought by the Plaintiff in the Case of Metal Polisher, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11 v. Kurz-Kasch, Inc., C-3-76-184, which this Court ordered to arbitration.

The legal issue raised in this Case—a question of contract interpretation—is identical to the legal issue raised in that case. The same contract clause is the subject of both cases.

The arbitration which the Court ordered in Case C-3-76-184 has been scheduled. An arbitrator has been agreed upon by the Company and the Union, and the arbitration hearing will be held on September 6, 1978, in Dayton. Labor arbitrators are required to render their awards within thirty (30) days of the hearing.

Counsel for both parties in this case agree that the course of this litigation will be substantially, maybe even

decisively, affected by the award in the other case, however it is decided. The award in that case could even lead to a prompt settlement of this case. In any event, it will affect the pleadings and strategy by both parties in this case.

Rather than involve both parties and this Court in pleadings and motions in this case, all of which may be rendered unnecessary by the award in the other case, both counsel believe it will facilitate the early disposition of the instant case if further pleadings in it are held in abeyance until the arbitration decision is made in Case Number C-3-76-184

Respectfully submitted,

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EXCERPTS

from AGREEMENT between

KURZ-KASCH, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 225, AFL-CIO

[6] ARTICLE VI.

GRIEVANCES

* * *

29. Should any Employee or group of Employees covered by this Agreement believe that he or they have been unjustly dealt with or that any provision of this Agreement has been or is being violated, such matters shall be taken up as follows for prompt and uniform determination:

* * *

[7] 33. STEP 4. Any grievance which has not been answered to the satisfaction of the Union shall at the request of the Union be arbitrated. Request for arbitration shall be made within five (5) working days after the decision of the Company in Step 3, has been received or should have been received. The Union shall serve notice to the Company of its intent to arbitrate.

* * *

[8] 35. No arbitrator may change or add to any provision of this contract. The decision of the arbitrator shall be final and binding upon both parties, and shall be complied with within five (5) working days or longer if necessary after the decision is rendered.

* * *

[8] 40. It is mutually understood and agreed that such board of arbitration or single arbitrator shall have jurisdiction only to interpret the contract between the Company and the Union, or to apply provisions of such contract to the determination of facts alleged to constitute a grievance, but shall have no jurisdiction or right to amend the terms or provisions of such contract.

* * *

[9] 47. The Company recognizes that the committeeman or a Union Representative has the right to present a grievance when it involves a group of Employees or the Union, or when the Employee is absent as a result of being suspended and/or discharged. Grievances of this nature will be submitted to the Superintendent in writing at Step 2.

* * *

[24] ARTICLE XX.

TERM

This Agreement shall be effective as of September 15, 1973 and shall remain in effect for a period of two (2) years, until midnight September 14, 1975, and thereafter for successive periods of one (1) year each, subject to determination by either party hereto at the end of any such year upon sixty (60) days' written notice to the other party of intent to terminate this Agreement or to amend or modify any of the terms or conditions hereof at the end of any such period. In the event of the giving of any such advance notice to terminate or amend this Agreement at the end of the original or any succeeding term hereof, this Agreement and all terms and conditions hereof shall terminate as of the end of the term in which such notice is given.

* * *

EXCERPTS

from AGREEMENT between

KURZ-KASCH, INC.

and

INTERNATIONAL MOULDERS AND ALLIED WORKERS UNION AFL-CIO, OHIO STATE LOCAL 45

[6] ARTICLE VI.

GRIEVANCES

* * *

Should any Employee or group of Employees covered by this Agreement believe that he or they have been unjustly dealt with or [7] that any provision of this Agreement has been or is being violated, such matters shall be taken up as follows for prompt and uniform determination:

* * *

[7] STEP 4. Any grievance which has not been answered to the satisfaction of the Union shall at the request of the Union be arbitrated. Request for arbitration shall be made within five (5) working days after the decision of the Company in Step 3. has been received or should have been received. The Union shall serve notice to the Company of its intent to arbitrate.

* * *

[8] No arbitrator may change or add to any provision of this contract. The decision of the arbitrator shall be final and binding upon both parties, and shall be complied with within five (5) working days or longer if necessary after the decision is rendered.

* * *

[8] It is mutually understood and agreed that such board of arbitration or single arbitrator shall have jurisdiction only to interpret the contract between the Company and the Union, or to apply provisions of such contract to the determination of facts alleged to constitute a grievance, but shall have no jurisdiction or right to amend the terms or provisions of such contract.

* * *

[9] The Company recognizes that the committeeman or a Union Representative has the right to present a grievance when it involves a group of Employees or the Union, or when the Employee is absent as a result of being suspended and/or discharged. Grievances of this nature will be submitted to the Superintendent in writing at Step 2.

* * *

[31] ARTICLE XXI.
TERM

This Agreement shall be effective as of September 15, 1973, and shall remain in effect for a period of two (2) years, until midnight, September 14, 1975, and thereafter for successive periods of one (1) year each, subject to termination by either party hereto at the end of any such year upon sixty (60) days' written notice to [32] the other party of intent to terminate this Agreement or to amend or modify any of the terms or conditions hereof at the end of any such period. In the event of the giving of any such notice to terminate or amend this Agreement at the end of the original or any succeeding term hereof, this Agreement and all terms and conditions hereof shall terminate as of the end of the term in which such a notice was given.

* * *

UNITED STATES DISTRICT COURT
Southern District of Ohio
Cincinnati, Ohio 45202

Chambers of
Carl B. Rubin
District Judge

January 24, 1979

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Re: Paul W. Weimer v. Kurz-Kasch, Inc., Civil No. C-3-78-173; and Metal Polishers, Etc. v. Kurz-Kasch, Inc., Civil No. C-3-76-184

Gentlemen:

I am in receipt of opinion and award by the arbitrator in the matter of Kurz-Kasch, Inc. and Metal Polishers Union. It is my impression that this is dispositive of the case that is presently pending before me of the same title and I propose to dismiss that action.

It is likewise my impression that the award of the arbitrator is dispositive of Weimer v. Kurz-Kasch and I would propose to dispose of that case as well.

In the event any of counsel feel that either or both of these cases require further consideration by the Court, I would appreciate such advice.

Very sincerely yours,

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
for the
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-3-78-173

PAUL W. WEINER, [sic]
Plaintiff

vs.

KURZ-KASCH, INC.,
Defendant

ORDER

(Filed March 15, 1979)

It appearing to the Court that all matters in controversy in the above matter have been disposed of by determination of the arbitrator in the matter of Metal Polisher, etc v. *Kurz-Kasch,* Case No. C-3-76-184, the above entitled matter is hereby DISMISSED with prejudice.

It is so ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

No. 80-1579

MAY 18 19[illegible]
ALEXANDER L. ST[illegible]
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

KURZ-KASCH, INC.,

Petitioner,

vs.

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 11,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Where an action has been brought by the Union to compel payment by the Employer of insurance premiums for retired personnel under the terms of an expired collective bargaining agreement, does the District Court commit reversible error when it stays the action and orders that the issue be arbitrated under the grievance procedure of that expired collective bargaining agreement which provides that "any grievance which has not been answered to the satisfaction of the Union shall at the request of the Union be arbitrated"?

2. Was the Circuit Court of Appeals correct when it found that, under the grievance provision of the collective bargaining agreement, as set out above, a District court could order arbitration only at the request of the Union?

SUMMARY OF ARGUMENT

The decision of the Sixth Circuit Court of Appeals found that, under the specific terms of the contract, the submission to the arbitral process of the dispute between the parties to the contract might be compelled only at the request of Local 11. Local 11 made no such request but rather chose to submit the matter to the District Court for adjudication.

The fundamental principle is that a party cannot be required to arbitrate a dispute unless he has first agreed to do so. Hence, under the specific facts of this case, and the specific language of the contract, the District Court was in error when it stayed the action and directed that the issue be submitted to an arbitrator. Moreover the Sixth Circuit Court of Appeals was correct when it then reversed that decision and remanded the case to the District Court.

All the cases cited by Petitioner are distinguishable in that the contract in each of those cases contained a mandatory arbitration clause. There is then no conflict between the decision of the Sixth Circuit in this case and the various decisions by the Supreme Court of the United States and the various Circuit Courts which are cited by the Petitioner.

The Petition for a Writ of Certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1579

KURZ-KASCH, INC.,

Petitioner,

vs.

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 11,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11, respectfully requests that the Petition for a Writ of Certiorari in the above captioned case be denied on the ground that Petitioner has demonstrated no conflict between the decision of the Sixth Circuit Court of Appeals and any prior decision of the Supreme Court of the United States or of any of the other Circuit Court of Appeals.

STATEMENT OF THE CASE

1. The Union's Action (Sixth Circuit Case 79-3379)

A. Statement of Facts

The facts set out on page six of the Petitioner's Brief are basically accurate. To summarize, however, upon the expiration on September 14, 1975, of a collective bargaining agreement which had been in existence between the Metal Polishers, Buffers, Platers and Allied Workers, Local No. 11 (Local 11), and the Petitioner, Kurz-Kasch, Inc. (Company) the Company closed the affected plants and thereafter notified Local 11 that it would no longer continue to pay group insurance premiums for retirees as required under the terms of the expired contract.

B. Statement of the Case

Thereafter Local 11 filed suit in the District Court, Southern District of Ohio, Western Division under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, seeking a declaratory judgment that the Company had unlawfully terminated the said group insurance policies; a mandatory injunction requiring the Company to reinstate the same; and judgment for any loss suffered by members of the Local as a result of the termination of said insurance policies.

On April 5, 1977, the District Court stayed the action, and ordered that the dispute be arbitrated. In so doing, the Court noted the existence of a grievance and arbitration provision in the expired contract which, by its terms, authorized ". . . any employee or group of employees . . . (who) believe that . . . any provision of the agreement has been or is being violated . . ." to file a grievance. (Pet. App. 26) Step four of that grievance procedure provides

"any grievance which has not been answered to the satisfaction of the Union shall, *at the request of the Union,* (emphasis added) be arbitrated." (Pet. App. 60)

It should be noted here that the Circuit Court of Appeals, Sixth Circuit, specifically found that

> contrary to the express findings of the District Judge, it appears that . . . Local 11 . . . never agreed to submit the cause to arbitration . . .
>
> (Pet. App. 3)

Subsequently the dispute between the retired employees and the Company proceeded to arbitration. The Employer contended that the claim was not arbitrable, having been barred by lapse of time under the terms of the contract.

The arbitrator found that, procedurally, the grievance was arbitrable, and, on the merits, denied the grievance. Whereupon the District Court dismissed the Local 11 action on February 21, 1979.

An appeal was then perfected by Local 11 to the Circuit Court of Appeals for the Sixth Circuit, which, on December 17, 1980, found

> . . . Local 11 . . . never agreed to submit to the cause to arbitration; . . . While it is possible to review extensively each of the highly technical claims of error, the Court, after a review of the file, is convinced that in all events, under the expressed language of the collective bargaining agreement, *the provisions which are the subject of the dispute* in these appeals were not arbitrable, unless the Union requested arbitration.
>
> (Pet. App. 3)

The cause was thereupon remanded to the District Court for further proceedings. From that order Petitioner has submitted his Petition for a Writ of Certiorari.

ARGUMENT

1. Nature of the Duty to Arbitrate

There can be no argument with the proposition that the federal policy, as reflected in the statute, and as interpreted by the Courts, is that "final adjustment *by a method agreed upon by the parties* (emphasis added) is declared to be the desirable method for settlement of grievance disputes . . .". (29 U.S.C. § 173 (d))

Involved in this seemingly simple sentence are three factors, each of which must be present before there can be a duty to resort to arbitration of disputes. First, there must be an agreement, a contract, defining the method of resolution of disputes or grievances; second, the dispute must be between the parties to the agreement; and third, the nature of the dispute, i.e. the subject matter, must be one which is included in the terms of the agreement.

It follows that, since it is dependent upon an agreement, the duty to arbitrarte, if there is one, is a matter of contract. It is a duty, defined by agreement, and imposed by that agreement upon the parties. To quote this Supreme Court,

> under our decisions, whether or not a (party) is bound to arbitrate . . . is a matter to be determined by the Court on the basis of the contract entered into by the parties.
>
> *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 238, 50 LRRM 2435 (1962)

Although questions involving the parties to the contract, and the definition of the subject matter of the dispute, were not addressed by the Circuit Court of Appeals, it may be appropriate to consider them briefly.

The grievance procedure contained in the contract, (Pet. App. 26) is by its terms applicable to *"any employee* or *group of employees* covered by this agreement (who) believe that . . . any provision of this agreement has been or is being violated . . .". The individuals, on behalf of whom Local 11 brought suit, are not employees. They are of course third party beneficiaries of the contract between the Union and the Company, but they represent, rather than employees, a limited class of retirees, individuals who have retired with 15 years or more of seniority with the Employer. They are not members of the bargaining unit, nor would they have had standing to sue the Company to compel arbitration of the claim. *Moruzzi* v. *Dynamics Corporation of America,* 443 F.Supp. 332 (S.D. N.Y. 1977). Hence, under the terms of the grievance procedure as indicated above, since they are no longer employees, the grivance procedures are inapplicable to them.

This Supreme Court has defined the word "employee" as being "someone who works for another for hire" and has expressly recognized that retirees are not employees, and that their primary right of recourse for deprivation of vested contract rights is a suit under Section 301. The Court stated

> Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the Employer . . .
>
> This does not mean that when a Union bargains for retirees — which nothing in this opinion precludes if the Employer agrees — the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioners' consent . . . Retirees, moreover will have a federal remedy under Section 301 of the Labor Management Relations Act for breach of contract if their benefits were unilaterally changed.

Allied Chemical & Alkali Workers of America, Local No. 1 v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)

These same principles were enunciated by the Sixth Circuit in *Hazen* v. *Western Union Telegraph Co.*, 518 F.2d 766 (1975):

> The Supreme Court has implied that (a retiree) has two avenues of recourse available without regard to acts or omissions of the Union, which is under no statutory duty of fair representation to her. See *Chemical Workers* v. *Pittsburgh Glass*, 404 U.S. 157, where it is indicated that a retired person who is no longer a member of a bargaining unit may either sue at common law under established contract principles or pursue a federal remedy under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of contract.

Hence, resort to the Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 on behalf of the retirees was appropriate.

With reference to the *subject matter* of a dispute which may require arbitration this Court has established the general policy that "only those subjects which the parties specifically exclude, . . . will be excluded from arbitration". *Steelworkers* v. *Warrior & Gulf*, 363 U.S. 585.

The Company's contention that the decision of the Court of Appeals for the Sixth Circuit is in error is based almost exclusively on the existence of this general policy in favor of arbitration of all disputes, excepting only those which have been specifically excluded.

However, the decision of the Circuit Court of Appeals, Sixth Circuit, in this case does not involve the question of the subject matter of this dispute. Rather, it decided the threshold question, (i.e. whether or not the parties

were compelled, by the terms of the agreement, to arbitrate all disputes), in the negative. It based its decision upon the fact that the arbitration clause of the grievance procedure, Step four, specifically provides that arbitration will be had, *at the request of the Union.* Such a request was never made. As a matter of fact it was not made by either the Union or the Company.

Since the Court of Appeals, Sixth Circuit, found that there was no duty to arbitrate, it follows that the discussion of the question of the nature or subject matter of the dispute in this case, the comparison to other cases involving "severance pay" and the question of exclusion from the arbitral process of specific grievances, etc., all as set out in the Petitioner's brief, is inappropriate. The question involved here, as decided by the Court of Appeals, is "Does the contract contain a preliminary, fundamental duty to arbitrate?". Not "Is the dispute one which was excluded from the arbitration clause?".

Therefore, unless that decision is in conflict with other cases decided by the Supreme Court or other Circuits, the Petition for the Writ of Certiorari must be denied.

2. The Decision by the Circuit Court of Appeals is not in Conflict with Prior Supreme Court Decisions.

Contrary to the Petitioner's representations, this case is not controlled by *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), (Pet. App. 12). That case involved an action brought by a laid off employee to recover severance pay due under the collective bargaining agreement. The Court, after discussing the question of whether or not a grievance concerning severance pay was excluded from the arbitration clause, went on to find that there was a mandatory arbitration provision which required all griev-

ances to be settled by virtue of the arbitration process. In that case Step four of the grievance procedure specifically provided that

> Grievances not satisfactorily settled in Step three may by written notice within ten days . . . of the . . . decision in Step three be appealed to an impartial arbitrator to be appointed by mutual agreement . . . within 15 days after *either* party has requested arbitration (emphasis added).
>
> 58 LRRM 2197, Footnote.

Since either party has a right to insist, under the terms of the agreement, upon arbitration of grievance disputes, the Court held that individual employees wishing to assert contract grievances must "attempt" use of the contract grievance procedure agreed upon by the employer and the Union as the mode of redress, before the individual employee may seek judicial relief.

Under the terms of the contract involved in our case there is no such mandatory arbitration clause. Arbitration may be had, under its terms, only if the Union requests it.

In addition, the *Maddox* case is not applicable here because, as indicated above, the grievance procedure in the relevant collective bargaining agreement limits the right to bring grievances to "any employee or group of employees covered" by the agreement. The individuals involved are no longer employees nor are they part of the bargaining unit represented by the Union. *Allied Chemical & Alkali Workers of America, Local Union No. 1* v. *Pittsburgh Plate Glass Company,* supra.

Nor is *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U.S. 235, applicable here. That case, overruling *Atkinson* v. *Sinclair Refining Co., supra,* created an ex-

ception to the prohibitions of the Norris-LaGuardia Act against the issuance of injunctions in labor disputes. It also, it is true, specifically states that an employer must arbitrate the underlying dispute if he is to receive the injunctive relief he seeks. However, the Court specifically points out that the exception to the Norris-LaGuardia Act is a very narrow one. That, before the injunctive relief requested can be granted, the Court must first find (1) the collective bargaining agreement contains a mandatory arbitration procedure (a mandatory duty on both parties to arbitrate); (2) the strike to be enjoined must be over an arbitrable grievance (i.e. the subject matter must be covered by the contract); and (3) that ordinary principles of equity must warrant the injunctive relief.

The Court in *Boys Market* found these factors to be present including a mandatory agreement to arbitrate in Article XIV, ¶ C, § 1, of the contract which provided "any matter not satisfactorily settled shall be submitted to arbitration *upon the written demand of either party*". 74 LRRM 2257.

Finally, the fact situation in *Boys Market* is totally inapplicable to this particular case. The Company is not seeking an injunction, nor is there any strike, threat of a strike, or even possibility of a strike involved in the subject case.

Nor is the decision in *Nolde Brothers, Inc.* v. *Local 358, Bakery and Confectionery Workers,* 430 U.S. 243 (1977), in conflict with the decision of the Sixth Circuit Court of Appeals.

The provisions of the contract, contained in Article XII, Grievance and Arbitration, § 2, provide "in the event that any grievance cannot be adjusted satisfactory by the procedure outlined above, *either* of the parties hereto may demand arbitration, and shall give written notice, . . .". Hence the question involved in the case was not whether or

not there was a mandatory duty to arbitrate all grievances. Rather it was a question of whether or not the subject matter of the dispute, i.e. severance pay for employees after the Company had gone out of business, was a matter to be included as one to be arbitrated.

The Court in that case concluded

> The parties agreed to resolve all the disputes by resort to the *mandatory* grievance arbitration machinery . . .

Hence, again, the question involved in *Nolde* was not whether there was a duty to arbitrate, but whether or not the subject matter of the dispute was one which was excluded from the arbitration clause.

To summarize, in each of the cases decided by the Supreme Court, cited by the Petitioner, there was a specific finding of a mandatory duty to arbitrate on the part of each party.

In our case, the contract provides that the duty to arbitrate shall be dependent upon the "request of the Union".

Hence there is no conflict between the decision of the Sixth Circuit Court of Appeals and the Supreme Court cases cited by the Petitioner.

3. The Decision of the Sixth Circuit Court of Appeals is not in Conflict with the Other Circuit Court Cases Cited by the Petitioner.

In the *IBEW, Local 278* v. *Jetero Corp.*, 404 F.2d 128 (Sixth Circuit, 1968) case, cited by the Petitioner, the injunction was denied to the Union not on the grounds of its refusal to defer to arbitration, but rather on the equitable grounds that the injunction would work hardships, injustice, and would be unenforceable.

The decision to compel arbitration of this and two other issues involved, was based upon the mandatory re-

quirement of the contract. This provision of the contract is not set out, but the Court does say specifically "the contractual requirement cannot be disputed". 88 LRRM at 2185

In *Chambers* v. *Beaunit Corporation,* 404 F.2d 128, 131, it was specifically found that "under Article IV of the Agreement, the Plaintiff . . . was required to submit the issues surrounding his discharge to arbitration". 67 LRRM at 2317

Similarly, in the *International Detective Service, Inc.* v. *Local 251* case the Court, citing the requirements necessary for a *Boys Market* type decision held "in the present case all of these prerequisites were met. The contract contained *a mandatory arbitration* clause, the strike arose over an arbitrable grievance." 103 LRRM at 2481

The argument raised in *Detective Service* by the Employer, against arbitration, was not that the contract did not contain a mandatory arbitration clause, but rather that the contract had expired. To which the Court said that if the Employer wanted the benefits of an injunction then it must necessarily also accept the responsibilities of the contract requiring arbitration.

In each of the cases cited by the Petitioner the contract involved contained a mandatory arbitration clause, as distinguished from the clause contained in the contract between the parties involved in the subject suit which provides that arbitration may be had "at the request of the Union". It cannot be said then that there is a mandatory arbitration clause requiring the Union to submit all disputes to the arbitrator. Moreover, the specific facts of this case distinguish it from those cited by the Petitioner in that the grievance procedure of the contract is limited to employees, and the individuals involved are not employees.

Since our case turns upon the specific fact situation, dis-

tinguished from the cases cited by Petitioner, there is no conflict.

CONCLUSION

The decision of the Sixth Circuit Court of Appeals found that, under the specific terms of the contract, the submission to the arbitral process of the dispute between the parties to the contract might be compelled only at the request of Local 11. Local 11 made no such request but rather chose to submit the matter to the District Court for adjudication.

The fundamental principle is that a party cannot be required to arbitrate a dispute unless he has first agreed to do so. Hence, under the specific facts of this case, and the specific language of the contract, the District Court was in error when it stayed the action and directed that the issue be submitted to an arbitrator. Moreover, the Sixth Circuit Court of Appeals was correct when it then reversed that decision and remanded the case to the District Court.

All the cases cited by Petitioner are distinguishable in that the contract in each of those cases contained a mandatory arbitration clause. There is then no conflict between the decision of the Sixth Circuit in this case and the various decisions by the Supreme Court of the United States and the various Circuit Courts which are cited by the Petitioner.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ALEXANDER L. STEVAS,
CLERK

No. 80-1579

In the Supreme Court of the United States

October Term, 1980

KURZ-KASCH, INC.,
Petitioner,

vs.

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 11,
Respondent.

- and -

KURZ-KASCH, INC.,
Petitioner,

vs.

PAUL W. WEIMER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 6, 1981

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QUESTION PRESENTED

1. Was the Court of Appeals correct in holding non-arbitrable a claim for retirement insurance benefits by retiree Weimer which arose three and one-third (3-1/3) months after the expiration of a collective bargaining agreement between the Union and the Company and one and one-half (1-1/2) months after the Company had permanently closed its facility, where the expired collective bargaining agreement provided for arbitration of employee grievances only, specifically arising under the agreement, and only at the request of the Union, when the Union made no such request?

SUMMARY OF ARGUMENT

The Petitioner has failed to demonstrate that the decision of the Court of Appeals for the Sixth Circuit is anything but consistent with the decisions of this Court and the decisions of other circuit courts. The Petitioner's argument rests all but exclusively on the broad presumption in favor of arbitrability. While the existence of this presumption cannot be denied, the Court of Appeals found that the presumption was sufficiently negated under the unique facts of the present case which pertained to alleged vested retirement insurance benefits allegedly surviving the bargaining agreement. The Petitioner has failed to cite a single authority in direct conflict with this decision. The sweeping generalizations and tenuous analogies relied upon by the Petitioner fail to demonstrate the necessity for resolution by this Court. The Petition for a Writ of Certiorari must be denied.

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- and -

KURZ-KASCH, INC.,
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vs.

PAUL W. WEIMER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

For the reasons stated below, respondent, Paul W. Weimer, respectfully requests that the Petition for a Writ of Certiorari in his above-captioned case be denied.

STATEMENT OF THE CASE

A. Nature Of The Case.

This action was commenced by the filing of a class action Complaint by Respondent, Paul W. Weimer ("Weimer"), on behalf of himself and all other similarly situated retirees/former employees of Petitioner, Kurz-Kasch, Inc. ("Company"). (Pet. App. 50).[1] The Complaint was filed pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185, and alleged that the Company's unilateral discontinuance of health and life insurance benefits 3-1/2 months after the collective bargaining agreements existed and 1-1/2 months after the permanent shutdown of the Company's plant constituted a breach of certain provisions pertaining to group insurance coverage as provided in two collective bargaining agreements with the Company. By an order and judgment of the District Court on March 15, 1979, the complaint was dismissed. (App. 1, 2).

As reflected in the order of dismissal, the District Court dismissed this case solely on the basis of an arbitration decision in *Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11 v. Kurz-Kasch, Inc.* (Pet. App. 21). This was done in spite of the fact that Weimer had not been a party to the arbitration proceeding, and had been denied the right to intervene in the *Metal Polishers* case on two separate occasions. (App. 5, 6-7).

Weimer was never afforded a hearing on the merits of his claim by the District Court. No answer or other responsive pleading was ever filed by the Company.

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1. All citations to "Pet. App." refer to the Appendix in the Company's Petition for a Writ of Certiorari.

On appeal, the United States Court of Appeals for the Sixth Circuit considered Weimer's case and the Metal Polishers' case together, although no formal consolidation had occurred. (Pet. App. 1). Because of the "confused record" caused by the irregularity of the proceedings below, the Sixth Circuit chose not to reach the "highly technical claims of error" raised by the Union and Weimer on appeal. (Pet. App. 3). Rather, the Court found that under the unusual facts presented, the issues raised in the District Court were not subject to arbitration. Thus, the Court of Appeals remanded both cases to the District Court for decision on the merits.

B. Statement Of Facts.

The only facts which are contained in the record of this case are set forth in the complaint. (Pet. App. 50).

Petitioner, Kurz-Kasch, Inc. ("Company"), is an Ohio corporation engaged in business in Dayton, Ohio, and other locations within the State of Ohio. The Company entered into two separate collective bargaining agreements with the International Association of Machinists and Aerospace Workers, Local 225, and the International Molders and Allied Workers Union, Local 45 ("Unions"). Both collective bargaining agreements contained nearly identical provisions governing group insurance benefits. The agreement with Local 225 Machinists provided:

> "It is agreed that Employees who are sixty-two (62) years of age or over or who retire prior to that age by reasons of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who have ten (10) years continuous employment by the Company, *may, upon retirement, continue their participating in existing group insurance plans applicable to such Employee by pay-*

ing fifty percent (*50%*) of the premiums required for such insurance. *The Company agrees to pay all such group insurance premiums required for continuation* of existing Employee group insurance *with respect to any Employee* who reaches the age of sixty-five (65) or more and who has fifteen (15) years or more continuous employment by the Company and *who retires under normal retirement from active employment.* The Company agrees to pay all such group insurance premium required for continuation of existing Employee group insurance with respect to any Employee who retires prior to age sixty-five (65) years of age under disability retirement in accordance with Federal Social Security Law from active employment, provided, such Employee has fifteen (15) years or more of continuous employment. *It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees, are in fact, retired* and remain unemployed, either by the Company or by anyone else, and that right is reserved to the Company to pay such further retirement benefits in such cases as it may in its discretion determine advisable in individual cases."

(App. 8-9) (Emphasis added).

The collective bargaining agreement with Local 45 Molders provided:

"It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who have ten (10) years' continuous employment with the Company, *may upon retirement, continue their participation in existing group insurance plans applicable to such Employee by pay-*

ing thirty percent (30% of the premium required for such insurance (twenty percent (20%), beginning September 15, 1974). *The Company agrees to pay all such group insuarnce premiums required for the continuation of* existing Employee group insurance *with respect to any Employee* who reaches the age of sixty-two (62) years or more and who has fifteen (15) years or more of continuous employment with the Company, or *who retires* prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law and has fifteen (15) years' continuous employment with the Company, *and who retires* from active employment. *It is understood and agreed that such insurance premium payment provision shall continue only so long as such Employees are, in fact, retired* and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases."

(App. 10-11) (Emphasis added).

A strike occurred on September 15, 1975, after expiration of the collective bargaining agreements. The Company ceased all production operations at its facility on November 17, 1975. (Pet. App. 24).

Prior to January 1, 1976, the Company maintained group insurance policies pursuant to the above provisions under which the retired members of the Unions were third-party beneficiaries. However, by letter dated September 16, 1975, the Company informed the retired ex-employees that the life insurance coverage for all retirees would be discontinued on January 1, 1976 and medical insurance would cease on February 1, 1976, and has since refused to

reinstate same. As a result, the members of the Unions coming within the terms of the above contractual provisions who were former employees of the Company were denied the benefit of the group insurance coverage which the Company was obligated to provide pursuant to the terms of the collective bargaining agreements.

Weimer, a former employee/retiree who was adversely affected by the action of the Company terminating the insurance coverage, filed a class action complaint in the United States District Court for the Southern District of Ohio on behalf of himself and all other former employees/retirees of the Company who were members of the aforementioned Unions. The relief demanded in the complaint included a judgment of the District Court that the Company had unlawfully terminated the group insurance policies and was obligated to keep them in full force and effect and a mandatory injunction ordering the Company to reinstate the insurance policies.

Prior to the filing of the complaint in the instant action, the Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO Local 11 had filed a similar action in the same district court. Weimer had previously filed a motion to intervene in that action (App. 3), rather than filing a separate lawsuit, but said motion was denied by the District Court. (App. 5). Consequently, Weimer had no alternative other than to file a separate legal action.

Despite the denial of his motion to intervene, throughout this litigation Weimer's claim has been controlled by the proceedings in the Metal Polishers' case. The District Court dismissed his case *sua sponte*, without a hearing and without so much as an answer being filed by the Company. The sole basis for the dismissal was that Weimer

was somehow collaterally estopped on the basis of the decision against the Metal Polishers, even though he was not a party in that action.

Likewise, because of these patent irregularities and the confused record in the proceedings in the District Court, the Court of Appeals did not address the substantial claims raised by Weimer on appeal. Instead, the Court of Appeals disposed of the case by upholding the Metal Polishers' argument that these claims are not arbitrable. (Pet. App. 3).

Because of this order of the Court of Appeals, the substantial issues raised by Weimer are not before this Court through the Petition for a Writ of Certiorari. Although Weimer's claim was never submitted to arbitration, his argument must be limited to the question of whether the claim is arbitrable.

Weimer, however, does have an interest in the questions presented in the Petition. Because the issues were determined not to be subject to arbitration, it becomes all the more apparent that the decision in the Metal Polishers' case cannot be *res judicata* in regard to Weimer's claim when he was in no way a party to that proceeding deferring to arbitration.

ARGUMENT

I. The Company Has Failed To Demonstrate That The Decision Of The Court Of Appeals For The Sixth Circuit Is Anything But Consistent With The Decisions Of This Court.

A. The General Policy In Favor Of Arbitration Is Not Controlling.

The Company's claim that the decision of the Court of Appeals for the Sixth Circuit is contrary to the decisions of this Court rests almost exclusively on the general policy in favor of arbitration. While the existence of this policy is not contested, it is not so sweeping as the Company so strongly suggests. The Company would have this Court ignore the intricate and unique facts of this case in favor of this general policy. None of the authorities cited by the Company support such a wholesale approach to the issue. No such authority exists. The Company cannot establish arbitrability in the peculiar facts of this case by a mere citation to the *Steelworkers* trilogy.[2] Certiorari must be denied.

B. The *Maddox* Case Is Totally Inapplicable In Light Of The Facts.

The Company claims that this case is controlled by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). (Pet. at 12). *Maddox*, however, has no applicability to this case. *Maddox* dealt with a laid-off employee's obligation to utilize the grievance and arbitration procedure in a severance pay

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2. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

claim. Any analogy between that situation and the present situation, involving a claim by retirees, relating to their vested insurance rights, against a Company who has closed its facility, does not withstand analysis.

First, because Weimer was not an employee and was not part of the bargaining unit represented by the Union [*Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)], he was not a party to the collective bargaining agreement, and thus was not bound by its arbitration provision. As recognized in the *Steelworkers* trilogy and virtually every other case cited by the Company, it is elementary labor law that arbitration is inherently consensual, and no party is bound to arbitrate in the absence of such consent. Thus, as the Sixth Circuit held below, Weimer's claim is not subject to the contractual grievance procedure. Indeed, Weimer would not have had standing to sue the Company to compel arbitration of this claim. *Moruzzi v. Dynamics Corp. of America*, 443 F. Supp. 332 (S.D.N.Y. 1977). By its terms, the grievance procedure in the relevant collective bargaining agreement limits the right to file grievances to "any *Employee or group of Employees* covered" by the agreement. (Pet. App. 62) (Emphasis added). *Also see Burke v. Adams & Ellis of Ellis, Inc.*, 603 F.2d 114 (9th Cir. 1979). Because Weimer was no longer an employee, the grievance procedures were inapplicable and unavailable to him.

Furthermore, in *Pittsburgh Plate*, this Court expressly recognized that retirees' primary right of recourse for deprivation of vested contract rights is a suit under Section 301.

> "Since retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer. . . .

> This does not mean that when a union bargains for retirees - which nothing in this opinion precludes if the employer agrees - the retirees are without protection. Under established contract principles, *vested retirement rights may not be altered without the pensioner's consent. . . . Retirees, moreover will have a federal remedy under §301 of the Labor Management Relations Act for breach of contract if their benefits were unilaterally changed."*

Id. at 181 n. 20 (Emphasis added). (*Citing Smith v. Evening News Assn.*, 371 U.S. 195 (1962); *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 470 (1960)). *Also see Moruzzi v. Dynamics Corp. of America*, 443 F. Supp. 332 (S.D.N.Y. 1977).

As the Sixth Circuit noted in its decision in *Hazen v. Western Union Telegraph Co.*, 518 F.2d 766 (6th Cir. 1975):

> "[T]he Supreme Court has implied that one in plaintiff's position has two avenues of recourse available without regard to acts or omissions of the union, which is under no statutory duty of fair representation to her. *See Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 181 n. 20, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971). There it is indicated that a retired person who is no longer a member of a bargaining unit may either sue at common law under established contract principles or pursue a federal remedy under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for breach of contract."

Id. at 769-70.

Thus, to uphold the Company's contention that Weimer's remedy is through arbitration rather than Section 301 would be to go directly contrary to the landmark case of *Pittsburgh Plate*. Such a result would deprive Weimer of one of the remedies expressly envisioned in that case,

and defeat Section 301's function of developing a federal body of law on questions such as these. Moreover, in light of *Pittsburgh Plate* and its progeny, Weimer would be without power to compel arbitration even if he were to consent to it. Thus, the Company's claim ignores existing precedent, and, if upheld, would effectively leave Weimer without a remedy.[3]

The *Maddox* decision is also inapplicable because it does not involve an expired collective bargaining agreement.

Finally, the Company's reliance on *Maddox* ignores the central thrust of the Sixth Circuit's decision. The Sixth Circuit found that, under the express terms of the collective bargaining agreements, disputes were not to be arbitrated unless the unions chose to do so. Because the union did not choose to exercise their option of seeking arbitration, the arbitration provisions in the contracts were inapplicable. (Pet. App. 3-4). *Maddox* involved no such contractual provision. The *Maddox* Court did not address the issue in the present case in holding or in dicta.

In short, the relevance of the *Maddox* decision to the present factual situation is limited to the general expression of a preference for arbitration. While the existence of this preference cannot be disputed, it does not go so far as to bind parties to arbitrate without their consent. The Petition for a Writ of Certiorari must be denied for this reason alone.

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3. Even if a union were to bring an action on behalf of retirees under this set of facts, as did the Metal Polishers in the companion case, it also would not be bound by the arbitration provisions in that it would no longer be acting as the representative of employees covered by the agreement. Once again, it is important to note that the entire grievance procedure is limited to complaints of active employees. (Pet. App. 62).

Likewise, it is unclear what significance *Chambers v. Beaunit Corp.*, 404 F.2d 128 (6th Cir. 1968), has to the decision in the present case. At most, *Chambers,* like *Maddox,* only stands for the proposition that when a matter is properly subject to arbitration under a collective bargaining agreement, the court should refrain from deciding the substantive issue involved. Because the Sixth Circuit in the instant case decided that the matter was not subject to arbitration under the unique facts of the case, *Chambers* is totally irrelevant.

C. The Rationale Behind *Boys Markets* Does Not Extend To The Present Case.

The Company's reliance on *Boys Markets, Inc. v. Retail Clerks' Union, Local 770,* 398 U.S. 235 (1970) (Pet. at 14), only serves to demonstrate the lack of authority supporting its Petition. *Boys Markets* was premised on a *quid pro quo* rationale. If a company desires a no-strike clause to be enforced through an injunction, it must display its good faith and willingness to reciprocate by honoring the arbitration provisions of the agreement. There is no similar *quid pro quo* rationale at work in the present case. There is no strike or threat of a strike. The Company has ceased operations and abandoned its employees. Weimer and the class of retirees which he seeks to represent, not being employees, have no economic threat at their disposal comparable to the strike. There is nothing that Weimer is seeking which is analogous to an injunction. Unlike in *Boys Markets,* the threat to industrial stability is nonexistent.

The *quid pro quo* rationale of *Boys Markets* was the product of a delicate balancing between the policies behind Section 301 and the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. Section 104. No such balancing is involved in the present case. While the Company

argues that the rationale of *Boys Markets* should be extended into this totally different context, it cites no authority for this extension. Such an extension would be unwarranted and unprecedented. *Boys Markets* has no bearing on the present case, and the Company's resort to such a distorted analogy as the basis for its Petition illustrates that there is no basis for the Petition at all.

D. Because The Presumption In Favor Of Arbitrability Has Been Expressly Refuted, *Nolde Brothers* Is Not Controlling.

Neither is this Court's decision in *Nolde Brothers, Inc. v. Local 358, Bakery and Confectionery Workers,* 430 U.S. 243 (1977), controlling in light of the unique facts in the present case. First, as demonstrated above, because Weimer is not an employee and is thus not subject to the grievance procedures, his claim is not arbitrable. *Nolde Brothers* deals only with the duty of the parties to arbitrate a dispute which concededly falls within the arbitration provision of the agreement after that agreement has expired. Because Weimer's claim was not arbitrable even under an existing agreement, *Nolde Brothers* is of limited relevance. Moreover, *Nolde Brothers* does not provide that the duty to arbitrate a dispute survives the expiration of the collective bargaining agreement and the shutdown of the plant indefinitely. Unlike in *Nolde Brothers,* Weimer's claim did not arise until three and one-half months after the expiration of the contract and one and one-half months after the shutdown of the facility. *Nolde Brothers* does not suggest that the duty to arbitrate survives such a hiatus.

Finally, even under *Nolde Brothers'* standard that the presumption favoring arbitrability must be negated either expressly or by clear implication, the Court of Appeals

found below that the presumption was so negated. (Pet. App. 3-4). As that court noted, the agreement clearly and expressly provides that, even if the subject matter of the dispute is generally arbitrable, a procedural precondition to arbitrability is that the union request arbitration. There is no consent by a union to arbitration until such a request is made. Neither the court nor the Company can force the union to consent.[4] Because there was no request for arbitration, and thus no consent to arbitration, the dispute is not arbitrable.[5]

Contrary to the bald assertions by the Company, there are other provisions in the collective bargaining agreements which demonstrate that the *Nolde Brothers'* presumption was clearly negated. The paragraph in the agreements which prefaces the grievance steps provides:

> "Should any *Employee or group of Employees* covered by this Agreement believe that he or they have been unjustly dealt with or *that any provision of this Agreement has been or is being violated,* such matters shall be taken up as follows. . . ."

(Pet. App. 62) (Emphasis added).

Importantly, this paragraph clearly and expressly limits the use of the grievance procedures to "any Employee

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4. Parenthetically, it should be noted that the Company at no time requested nor consented to the arbitration of the dispute. It was only after a favorable decision by the arbitrator that the Company chose to defend the decision of the District Court to compel arbitration. (App. 12).

5. Even if the Company were correct that the collective bargaining agreements do not expressly preclude arbitration under this unique set of facts, there is at least a clear implication precluding such arbitration. Because the agreements only provided for procedures for the Union to request arbitration, the negative implication is that neither the Company nor anyone else could invoke the arbitration procedures, especially a retired employee.

or group of Employees covered by [the] Agreement." Because Weimer is not an employee under the *Pittsburgh Plate* doctrine, the grievance procedures, including the arbitration provision, are not applicable to him.

Moreover, the claims subject to the grievance procedure are only those arising when a specific provision of the agreement has been violated. Conversely, in *Nolde Brothers,* the grievance procedures were broadly applicable to any grievance arising between the parties. *Id.* at 245. The narrower dispute provisions in the present case are not indicative of an intent to arbitrate disputes arising long after the expiration of the agreement. Rather, this language indicates that "[a]ll disputes arising 'under' the agreement are to be arbitrated; those that are collateral to the agreement are not." *Rochdale Village, Inc. v. Public Service Employees Union, Local No. 80,* 605 F.2d 1290, 1296 (2nd Cir. 1979). Because Weimer's claim is based on vested benefits collateral to the expired agreement, the narrow grievance provisions are not applicable to his claim. Thus, contrary to the Company's assertions, the agreement, taken as a whole, supports the decision of the Sixth Circuit. The Petition for a Writ of Certiorari must be denied.

On page 16 of its Petition, the Company attempts to rewrite the decision of the Court of Appeals to support its tenuous arguments:

> "The Court did not find, as it could not, that the contractual language expressly precluded arbitration of these disputes; instead it improperly held that because the parties' contracts did not expressly *include* language permitting arbitration at the instigation of the court, rather than the union, the disputes were not within the grievance and arbitration provisions of the contract. . . ."

(Pet. 16) (Footnote omitted).

Even a cursory reading of the decision below reveals the inaccuracy of this contorted interpretation. In no uncertain terms, the Sixth Circuit held that:

> "[U]nder the *express* language of the collective bargaining agreement, the provisions which are the subject of the dispute in these appeals were not arbitrable, unless the Union requested arbitration. . . ."

(Pet. App. 3) (Emphasis added).

Thus, consistent with *Nolde Brothers*, the Sixth Circuit found that the agreements expressly precluded arbitration. The Company cannot give substance to its skeletal argument by rewriting the opinion below. The decision is consistent with precedent and amply supported by the facts. The Petition for a Writ of Certiorari must be denied.

II. There Is No Conflict Between The Decision Of The Sixth Circuit And Those Decisions Of Other Circuits With Respect To The Arbitrability Of Weimer's Claim.

In part two of its argument (Pet. App. 16), the Company cites a variety of lower court cases which support the general proposition that there is a presumption in favor of arbitrability. Once again, the existence of this presumption is not challenged. The question is whether or not presumption has been overcome in this particular set of facts where:

> (1) The collective bargaining agreements expressly provided only that the Union has the right to invoke the arbitration procedures;
>
> (2) The collective bargaining agreements have expired, and the Company's facility had shut down, long before the claim for benefits arose;

(3) The grievance procedures are limited to only those claims arising under the collective bargaining agreements, rather than more broadly providing for arbitration of all grievances arising between the parties; and

(4) The subject of the claim involves only the rights of retirees, who are not employees, who are not members of the bargaining unit, and who are not bound by the provisions of the collective bargaining agreements, and who cannot file grievances under the contract grievance procedures.

Importantly, the Company has failed to cite a single authority with even remotely similar facts in support of its claim that the decision of the Sixth Circuit conflicts with decisions of other Circuits. There are no such conflicting authorities. The Petition for a Writ of Certiorari must be denied.[6]

CONCLUSION

The Company's argument rests all but exclusively on the broad presumption in favor of arbitrability. While the existence of that presumption cannot be denied, the Court of Appeals found that the presumption was sufficiently negated under the unique facts of the present case. The Company has failed to cite a single authority in direct conflict with the decision. The sweeping generalizations and tenuous analogies relied on by the Company fail to demonstrate the necessity for resolution by

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6. Because part two of the Company's argument is little more than a restatement of its first argument, Respondent Weimer finds it unnecessary to burden this Court by repeating his position. Part one of Respondent Weimer's argument adequately disposes of all arguments raised in both part one and part two of the Company's Petition.

this Court. The Petition for a Writ of Certiorari must be denied.[7]

Respectfully submitted,

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LANG, HORENSTEIN & DUNLEVEY
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(513) 224-7200
Counsel for Respondent,
Paul W. Weimer

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7. While it is recognized that consideration of an appropriate remedy is premature at this time, Respondent Weimer must express his objection to the remedy sought by the Company. The Court of Appeals for the Sixth Circuit expressly declined to decide other substantial issues raised by the parties because resolution of these issues was unnecessary to its decision. If this Court were to find that the Court of Appeals was in error, the only appropriate remedy would be a remand to that court for consideration of the other important issues raised on appeal. Reinstating the District Court's judgment in Weimer's case would be sanctioning that Court's *sua sponte* dismissal of Weimer's claim, without a hearing on the merits and without so much as an answer being filed by the Company.

Even if Certiorari is granted in *Kurz-Kasch, Inc. v. Metal Polishers, Buffers, Platers and Allied Workers International Union, AFL-CIO, Local 11*, the Petition must be dismissed in *Kurz-Kasch, Inc. v. Weimer*, so that Weimer may have his day in court without further delay.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division, at Dayton

No. C-3-78-173

PAUL W. WEIMER,
Plaintiff,

v.

KURZ-KASCH, INC.
Defendant.

ORDER

(Filed March 19, 1979)

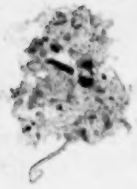
It appearing to the Court that all matters in controversy in the above matter have been disposed of by determination of the arbitrator in the matter of Metal Polisher, etc. v. Kurz-Kasch, Case No. C-3-76-184, the above entitled matter is hereby DISMISSED with prejudice.

It is so ORDERED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Civil Action File No. C-3-78-173



PAUL W. WEIMER,
Plaintiff,

vs.

KURZ-KASCH, INC.
Defendant.

JUDGMENT

(Filed March 15, 1979)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that upon the determination of Case C-3-76-184; the above entitled matter is hereby DISMISSED with prejudice.

Dated at Dayton, Ohio, this 15th day of March, 1979.

John D. Lyter
Clerk of Court
By: /s/ Rebecca E. Anderson
Rebecca E. Anderson,
Deputy

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division, at Dayton

Case No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

vs.

KURZ-KASCH, INC.
Defendant.

MOTION OF PAUL WEIMER TO INTERVENE AS PLAINTIFF

(Filed November 15, 1977)

PAUL WEIMER moves this Court, pursuant to Rule 24 of the Federal Rules of Civil Procedure, for leave to intervene as plaintiff in this action on behalf of himself and all other persons, not represented by present plaintiff, who are retired former employees of Defendant Kurz-Kasch, Inc. who have been deprived of certain fringe benefits accorded to them by contract as alleged in the original complaint.

This Motion is instituted to assert a claim set forth in the proposed complaint of which a copy is attached hereto and incorporated by reference.

/s/ James R. Kirkland
James R. Kirkland, Trial Attorney
For Plaintiff Paul Weimer, On
His Own Behalf and On Behalf
of Other Retired Employees of
Kurz-Kasch, Inc.

Legler, Lang & Kuhns
1401 Talbott Tower
Dayton, Ohio 45402
1-513-224-7201

/s/ Robert T. Dunlevey, Jr.
Robert T. Dunlevey, Jr.
Of Counsel
Legler, Lang & Kuhns

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division

No. C-3-78-173

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

v.

KURZ-KASCH, INC.
Defendant.

ORDER

(Filed January 12, 1978)

This matter is before the Court upon the motion of Paul Weimer to intervene as a plaintiff in this action on behalf of a class of similarly situated former employees of defendant.

Since an appeal of the Court's order of April 5, 1977, is presently pending and since the outcome of that appeal may require Mr. Weimer's intervention in an arbitration proceeding, the Court is unwilling to grant intervention at this time.

Accordingly, the motion to intervene is hereby DENIED subject to resubmission upon the commencement of further proceedings in this court.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division

No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

v.

KURZ-KASCH, INC.,
Defendant.

ORDER

(Filed April 18, 1978)

This matter is before the Court upon the motion of Paul Weimer for reconsideration of the order of January 12, 1978, denying his motion to intervene.

Upon review of Weimer's memorandum, the Court concludes that his intervention in this action would not be appropriate. If he has rights which he wishes to assert, he must commence a separate suit.

Accordingly, the motion for reconsideration is hereby DENIED.

/s/ Carl B. Rubin
Carl B. Rubin
United States District Judge

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Civil Action File No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

v.

KURZ-KASCH, INC.,
Defendant.

JUDGMENT

(Filed April 17, 1978)

This action came on for (hearing) before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the motion of Paul Weimer for reconsideration is hereby DENIED.

John D. Lyter
Clerk of Court
By: /s/ Rebecca E. Anderson
Rebecca E. Anderson, Deputy

EXCERPTS

from AGREEMENT between

KURZ-KASCH, INC.

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 225, AFL-CIO

ARTICLE XV.

GROUP INSURANCE

105. It is agreed that Employees who are sixty-two (62) years of age or over or who retire prior to that age by reason of such disability as entitles the Employees to disability benefits under the Federal Social Security Law, and who have ten (10) years continuous employment by the Company, may, upon retirement, continue their participating in existing group insurance plans applicable to such Employee by paying fifty percent (50%) of the premiums required for such insurance. The Company agrees to pay all such group insurance premiums required for continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-five (65) or more and who has fifteen (15) years or more continuous employment by the Company and who retires under normal retirement from active employment. The Company agrees to pay all such group insurance premium required for continuation of existing Employee group insurance with respect to any Employee who retires prior to age sixty-five (65) years of age under disability retirement in accordance with Federal Social Security Law from active employment, provided, such Employee has fifteen (15) years or more of continuous employment. It is understood

and agreed that such insurance premium payment provision shall continue only so long as such Employees, are in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved to the Company to pay such further retirement benefits in such cases as it may in its discretion determine advisable in individual cases.

EXCERPTS

from AGREEMENT between

KURZ-KASCH, INC.

and

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION AFL-CIO, Local 45

ARTICLE XVI.

GROUP INSURANCE

3. It is agreed that Employees who are sixty-two (62) years of age or over, or who retire prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law, and who have ten (10) years continuous employment with the Company, may, upon retirement, continue their participation in existing group insurance plans applicable to such Employee by paying thirty percent (30%) of the premium required for such insurance (twenty percent (20%), beginning September 15, 1974). The Company agrees to pay all such group insurance premiums required for the continuation of existing Employee group insurance with respect to any Employee who reaches the age of sixty-two (62) years or more and who has fifteen (15) years or more of continuous employment with the Company, or who retires prior to that age by reason of such disability as entitles the Employee to disability benefits under the Federal Social Security Law and has fifteen (15) years continuous employment with the Company, and who retires from active employment. It is understood and agreed that such insurance premium payment provision shall

continue only so long as such Employees are, in fact, retired and remain unemployed, either by the Company or by anyone else, and that right is reserved by the Company to pay such further retirement benefits in such cases as it may, in its discretion, determine advisable in individual cases.

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio

Civil Action File No. C-3-76-184

METAL POLISHERS, BUFFERS, PLATERS AND ALLIED WORKERS INTERNATIONAL UNION, AFL-CIO, Local 11,
Plaintiff,

vs.

KURZ-KASCH, INC.,
Defendant.

ORDER

(Filed May 4, 1977)

This matter is before the Court upon the defendant's motion for reconsideration of an order issued by this Court on April 5, 1977, requiring the parties to proceed to arbitration.

Defendant argues that the Union's claim is time-barred under the contract. Normally, failure to file a timely grievance is fatal to an employee's claim. *See, Chambers v. Beaunit Corporation,* 404 F.2d 128 (6th Cir. 1968); *Amalgamated Clothing Workers v. Ironall Factories Co.,* 386 F.2d 586 (6th Cir. 1967). However, we read *N.C.R. Employees' Independent Union v. National Cash Register Co.,* 489 F.2d 716 (6th Cir. 1973), *cert. den.* 416 U.S. 970 (1974), as creating a very narrow exception to this rule where unusual circumstances are presented.

As was stated in this Court's prior order, the *Nolde Brothers* decision resolved what had been a confused area

of the law. *See, e.g., Chattanooga Mailers Union Local No. 92 v. Chattanooga News-Free Press Co.*, 524 F.2d 1305, 1311 (6th Cir. 1975). When the parties' agreement expired in September of 1975, the Union could have reasonably considered the courts to be their sole forum for deciding this dispute. Under these circumstances, we believe that the holding in the N.C.R. Employees case is directly applicable.

Accordingly, defendant's motion is hereby DENIED.

It is so ORDERED.

(s) Carl B. Rubin, United States District Judge.